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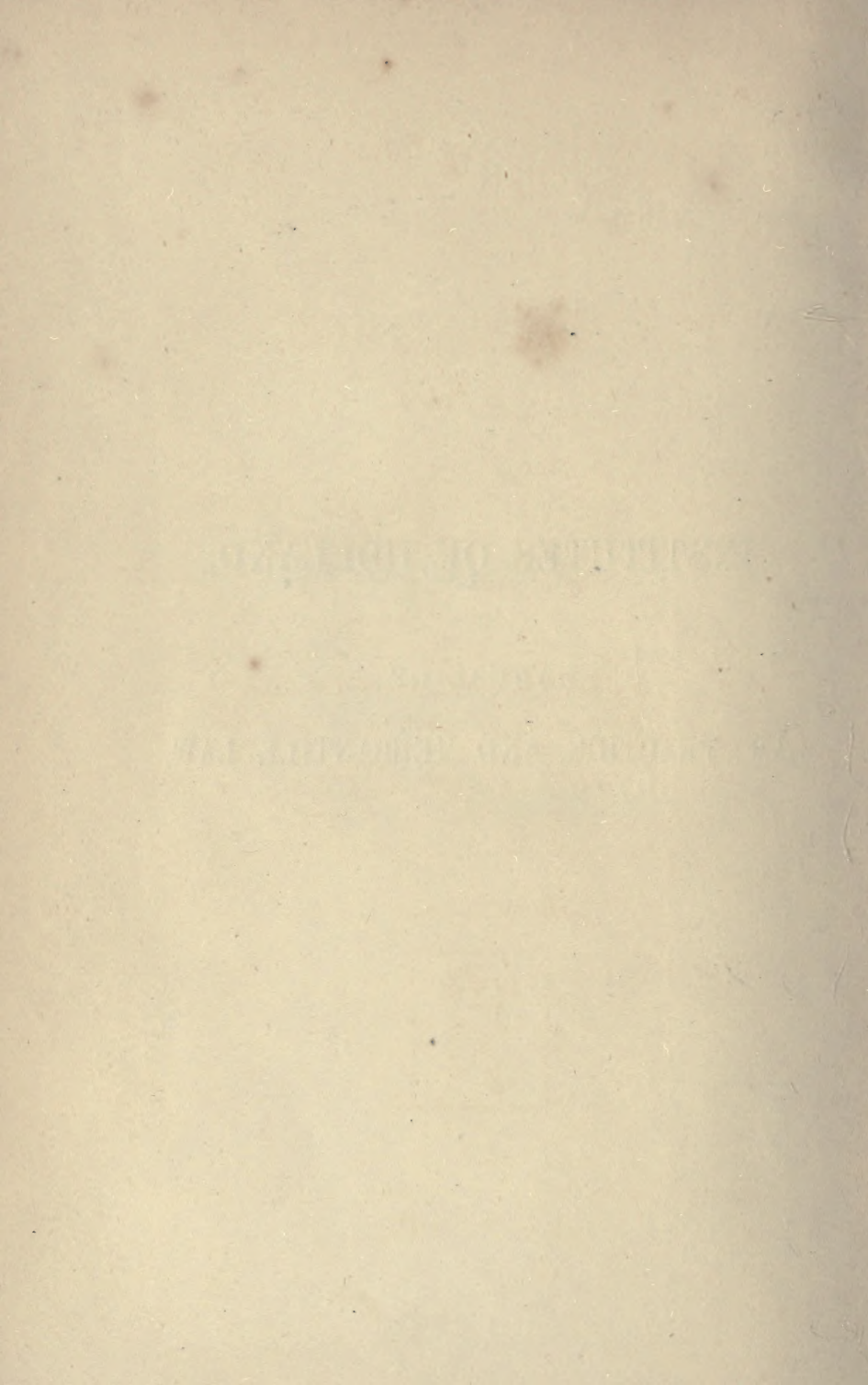
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INSTITUTES OF HOLLAND,  
OR  
MANUAL OF  
LAW, PRACTICE, AND MERCANTILE LAW.





Law  
For  
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INSTITUTES OF HOLLAND,  
OR  
MANUAL OF  
LAW, PRACTICE, AND MERCANTILE  
LAW,

FOR THE USE OF  
JUDGES, LAWYERS, MERCHANTS, AND ALL WHO  
WISH TO HAVE A GENERAL VIEW  
OF THE LAW.

BY  
MR. JOANNES VAN DER LINDEN,  
ADVOCATE AT AMSTERDAM.

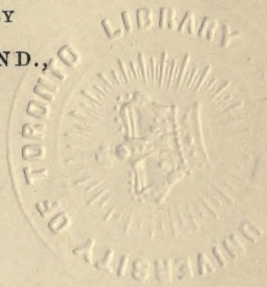
TRANSLATED FROM THE ORIGINAL DUTCH BY  
SIR HENRY JUTA, LL.B. LOND.,  
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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“Ex studio praeceptionum quarundam, et theorematum universalium, quibus ad judicandum ex bono et aequo de singulis negotiis praeparemur et informemur, cognitio Jurisprudentiae tantum speranda est. Nam singularia, quia infinita sunt, sub nullam artem, aut praeceptionem cadunt.”

F. DUARENUS, in *Epist. de ratione docendi discendique Juris*, oper. tom. ii., p. 292, col. 1.





TO  
SIR J. H. DE VILLIERS, K.C.M.G.,  
*This Translation*  
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TRANSLATOR.



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## PREFACE BY THE TRANSLATOR.

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I FEEL that a few words are necessary to explain the publication of this new translation. No doubt many readers of the original text have discovered that Mr. Henry's translation is not entirely free from inaccuracies. These errors might have been corrected, and the translation republished, had it not been that serious difficulties as to the copyright arose, upon learning which I was induced to translate the whole book over again. I intended at the same time to bring the law contained in the *Institutes* as much as possible up to date ; but, after some time and labour spent upon it, the idea had to be abandoned, as I found that it would take a long time to carry it out properly, and that Mr. Henry's translation was rapidly going out of print.

The old name of *The Institutes of Holland* has been retained for obvious reasons.

I have tried to avoid as much as possible translating technical Dutch terms by words which to the English lawyer convey a somewhat different meaning, and have preferred leaving the original word as it is, and explaining it by a foot-note. Sometimes, however, it was

impossible to avoid doing this. In conclusion, I may add, I shall be very glad to receive any suggestions upon my translation, and, in the words of GROTIUS, "*Non illi promptius me monebunt errantem, quam ego monentes sequar.*"

CHAMBERS, CAPE TOWN,  
November, 1883.



## PREFACE TO THE READER.

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I WILL shortly state here what induced me to write this book. The late Jacob Loveringh, bookseller, published some time ago a certain little work, under the title of *A Civil, Legal, Notarial and Mercantile Manual*, which ran through three editions, the last of which was printed in the year 1761. Mr. John Allart, bookseller, who possessed the copyright of that little book—then quite out of print—wished to publish a new edition, and requested me to make the necessary corrections and additions. Perusing the book with this view, I soon found that, praiseworthy as the intention of the author was, his execution was a miserable failure. Nearly all the definitions were most inaccurate; in many places one found obscurities, sometimes even unintelligible periphrases: incomplete in many respects, it was full of redundancy in others, and the references to authorities were far from being accurate. My opinion that this judgment was not severe, but quite correct, I afterwards found confirmed on accidentally meeting with the *Nederlandsche Letter-Courant*, by E. Luzac (vol. iv., p. 324, *et seq.*), in which a critique of this little book appears, almost

identical with the above remarks. I therefore informed the bookseller Allart that, on examination, I had found the work executed in such a manner that, to speak candidly, nothing could be done with it, and that I could not comply with his request.

Nevertheless, the perusal of this book led me to believe that a small work of the same kind would be very useful if properly executed; besides, no such book existed, since the *Introduction to Dutch Jurisprudence*, by *H. Grotius*, however invaluable, is much too difficult for persons not learned in the law to understand, and, moreover, does not include all the branches of the law; and the *Roman-Dutch Law*, by *S. van Leeuwen*, which was formerly much used to obtain a general knowledge of our law, is so far removed from the more civilised taste of our time that, although indeed, still a good book, it no longer fulfils its object. Works of this nature composed by other authors serve rather to confuse than to assist persons not learned in the law, and therefore deserve no mention here.

Induced by these and other considerations to try my own powers in composing a work of this nature, and, instead of bringing out something in which the defects could never be perfectly remedied, rather to compose an entirely new book, I determined to write this manual. In it I have discussed the general principles of the whole of our modern jurisprudence and procedure, confining myself, however, specially to the province of *Holland*; because to treat of the particular



laws of different provinces which differ so widely from each other would cause nothing but confusion, and would result in an imperfect whole (1). Nevertheless, the first principles of law are everywhere nearly the same, and for this reason I believe that this book may be found useful throughout the whole country.

My object really being to write for the instruction of persons unacquainted with the law and desirous of a general and well-founded idea of law and procedure, I have endeavoured to express myself clearly, agreeably, and accurately. And although it was useless and even impossible to exhaust all the branches of jurisprudence and procedure in *one octavo volume*, yet I imagine that all the principles are so fully demonstrated that any one who thoroughly understands them and applies them properly will be able to decide a hundred different cases for himself; at any rate he will have opened and cleared the way for entering upon a more thorough inquiry with advantage. By means of short notes I have always supported my propositions by the best authorities; and I should be very much disappointed if even persons more versed in law were not to meet with something worthy of attention.

The order I have observed is shortly this. After an *introduction*—in which are laid down the necessary instructions for the foundation both of the study of

(1) The *Differentiae Juris Romani et Belgici*, by Prof. Voorda, and the *Institutiones Juris Belgici Civilis*, by Prof. Arntzenius, although they contain much good matter, clearly show how impossible it is to reduce to one *system* laws which differ in analogy.

jurisprudence and of a select law library—I divide the work into four books. The *first book* treats of civil law, the *second* of criminal law, the *third* of procedure in civil and in criminal cases, and the *fourth* of the laws relating to commerce. Lastly, a full *index* completes the whole.

For myself, I must say I have accomplished this work with satisfaction and advantage. I have had the opportunity of refreshing my memory upon the principles of all branches of law and procedure. I by no means entertain the conceited idea that my book is above *criticism*; still, I fancy I may flatter myself that it is well adapted to serve as a guide for those who, without having studied law, have to deal with legal matters, for young men who proceed to the Bar on leaving the university, and, lastly, for particular persons who, to some extent, wish to see with their own eyes what is or is not agreeable to the principles of law and procedure. If my work effects this object, I need never begrudge the time spent upon it.

May the reader use this book with advantage, and always fare well.

J. VAN DER LINDEN.

AMSTERDAM,  
20th October, 1806.

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[Containing the necessary instructions for the foundation, both of the Study of Jurisprudence and of a Select Law Library.]

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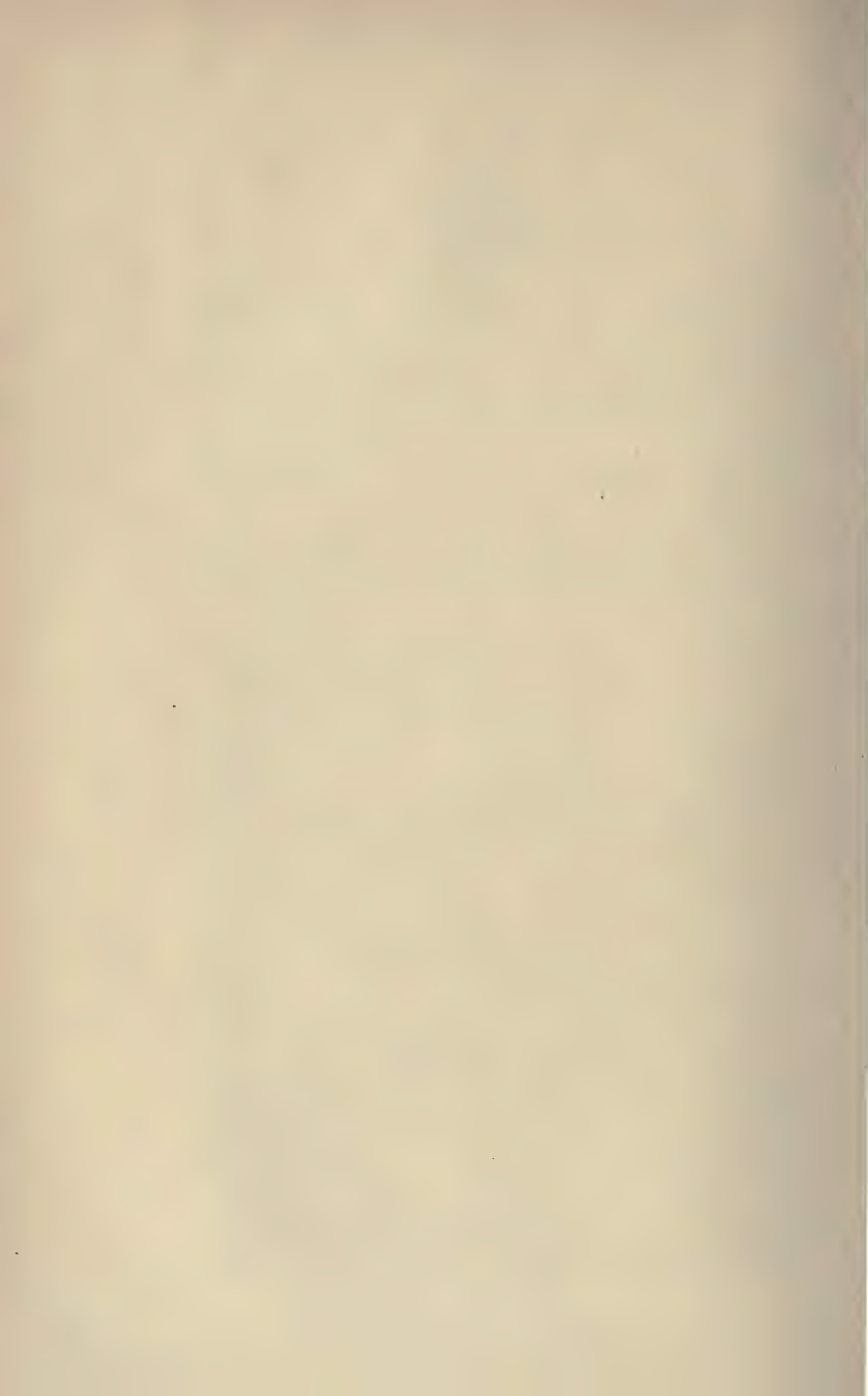
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# INTRODUCTION,

CONTAINING THE

NECESSARY INSTRUCTIONS FOR THE FOUNDATION  
BOTH OF THE STUDY OF JURISPRUDENCE  
AND OF A SELECT LAW LIBRARY.

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## CHAPTER I.

FOUNDATION OF THE STUDY OF JURISPRUDENCE.

### SECTION I.

EVERY one who wishes to study a science—whichever General rules. it may be—ought to bear in mind, as a general rule, that he must commence with learning its elements and making himself perfectly acquainted with them before reading more extensive works, or entering upon controversial points relating to that science. Whoever follows a different course, and neglects the elements of a science, will never acquire a well-grounded knowledge of it, nor become capable of discussing or deciding matters of controversy upon sound grounds (1). The same may also be said of jurisprudence in particular. Very often the most elementary principles of law are sufficient to decide the most important

(1) H. Grotii, *et aliorum*, *Dissertationes de Studiis instituendis* (L. B., 1645, in 12vo.). E. Scheidii, *Opuscula, de Ratione Studii* (L. B., 1792, three vols. in 8vo.).

disputes; and whoever is either ignorant of these elements, or is not able to apply them, can never be clear in argument and can never succeed in settling points of controversy (1). What then is the best course to adopt in order to acquire a well-grounded knowledge of law, and what books ought to be made use of, are questions which this *Introduction* is intended to answer.

## SECTION II.

Fitness for  
the studies.

The first point to be considered is personal fitness for the study and practice of law. Besides the general requisites which are always necessary for the study of sciences, a man must have a certain peculiar character in order to become a good jurist (2). As this study is, from its nature, often dry and troublesome, he must be industrious and patient. The correct application of principles to particular cases being the true criterion of a good lawyer, he must therefore be *judicious*. As the chief object in the administration of legal proceedings must always be *to render every man his own*, he must be *upright* and a *man of honour* (3). The great variety of cases that present themselves, the daily intercourse with all sorts of people, entail a *knowledge of human nature*. As it is part of his duty to lay the interests of his clients properly before the judge, a *natural fluency of speech* is essentially necessary. A lazy and impatient man—one who is wanting in sound

(1) C. G. Buder, *Selecta Opuscula de Ratione ac Methodo Studiorum Juris* (Jenæ, 1724, in 8vo.).

(2) Cicero, *De Offic.*, lib. ii. cap. 19, "*Omnes non possunt, ne multi quidem, Jurisperiti esse.*"

(3) J. C. Rucker, *Oratio, de vero Jcto, viro bono* (L. B., 1758).

judgment, whose nature is dishonest and dishonourable, who does not know how to deal with men, or who cannot express himself fluently—ought by no means to embrace the profession of the law (1).

### SECTION III.

Beside the *personal* aptitude, there must also be a *Preparatory studies.* *real* fitness—that is, a man must be properly trained in those *preparatory studies* without which a well-grounded knowledge of jurisprudence can never be acquired. On the one hand the preparatory studies ought not to be pursued to such an extent that half the university course has elapsed before the principal study of law is entered upon, still, on the other hand, no one should commence the study of the law until he is thoroughly able to comprehend and understand the reading which is required.

In our opinion the preparatory studies are principally the following:—

1. A thorough knowledge of *Latin*. This is the true key to all knowledge; and although every one cannot be a *Muretus*, an *Ernesti*, a *Ruhnkenius* or a *Wytttenbach*, yet the want of a sound Latinity detracts from an otherwise meritorious scholarship. To the jurist in particular it is indispensable, since the Roman law is written in this language; and, in order to understand the latter properly, he ought, above all, to study the Latinity of the Roman jurists.

2. A knowledge of *Greek* sufficient to refer, when

(1) P. Roscam, *Oratio, de Præcipuis, quæ verum Jctum commendant, dotibus* (Traj., 1777).



necessary, with advantage to the *Paraphrasis* of Theophilus, the *Basilica* and the original text of Justinian's *Novellen* (1).

3. A knowledge of *Roman history* and *antiquities*.

It is most necessary for the jurist to be acquainted with the fortunes of the Republic and the decline of the Roman Empire, especially to be able to determine what prior laws were repealed by later laws. By Roman antiquities we do not so much mean the *mythology*—which is necessary in order to understand the old poets—as *political antiquities*, by which one becomes familiar with the various powers of the Roman public officers, and of those who had places at court under the Empire, and with the requisites of ceremonious proceedings; *e.g.*, manumission, adoption, marriages, wills, etc.

4. A knowledge of the *history of Roman law*. Men speak of the *Law of the XII. Tables*—of the *Lex Julia, Cincia, Cornelia, Voconia*, and others—of *Ulpian, Papinian, Paul*, and other jurists—of the *Edictum Perpetuum* of the *Prætor*—of the *Sabinian and Proculian* schools—of the *Codeæ Theodosianus*—of the compilation of the *Corpus Juris* by command of the Emperor *Justinian*, etc. How very superior to others is that man who knows the history of all this!

5. A general knowledge of *philosophy*, in which one ought to confine oneself principally to *logic*, or the art of reasoning, by means of which correct conclusions may be distinguished from fallacies; to *mathematics*, by which a man learns to think correctly and concisely; to *ethics*, or *moral philosophy*, by which a know-

(1) P. Bondam, *Oratio, de Lingue Græcæ cognitione, Jcto necessariâ* (Zutph., 1755).

ledge of the general duties of a man and a citizen is acquired.

6. Lastly, some acquaintance with *modern* or living languages is also most useful. *French* and *German* deserve a particular recommendation. Without the former one cannot nowadays move in good society, and without the latter one is shut out from a great many learned works, which Germany has produced within about the last fifty years, on every branch of science. That a polished style in our own language, a knowledge of the history of this country and its constitution, with the changes it underwent from time to time and its present condition, are indispensable to a lawyer surely requires no demonstration.

#### SECTION IV.

The student after this preparation commences the actual study of jurisprudence, and cannot fail, provided The study of jurisprudence. he takes care to pursue *a proper course* of study, to succeed in it. To maintain this *course*, the following rules should be steadily borne in mind:—

*a.* The foundation of the knowledge of any system of law must consist in the knowledge of the pure Roman law as it is contained in the code termed the *Corpus Juris of the Emperor Justinian*. Refer to all the codes drawn up in different countries within the last few years, including even the “*Code du Droit François*,” and you will soon be convinced that if their compilers had not taken advantage of the Roman law the result would have been most lamentable.

*b.* He who wishes to study Roman law thoroughly must study it in its *pure condition*, and, as it were,

transplant himself into the period of the old Romans; nothing is worse at the commencement than engrafting upon it any modern law. Each of these systems has a different *analogy*, which must not be confounded with each other. We consider it therefore a great mistake for a man intending to study law to commence by attending the chambers of an attorney or notary.

c. The study of jurisprudence must be commenced with the *Roman law* and not with the *law of nature and of nations*; who once becomes interested in the latter will take to the much drier reading of the works of the Roman jurists with disgust, and consequently runs the risk of making no great progress in it (1).

d. Although it is undoubtedly true that matters still in use at the present day deserve our attention more than those which are old and obsolete, yet the student of Roman jurisprudence should endeavour to obtain a knowledge of the Law of *Servi et Liberti*, *Manumission*, *Emancipation*, and *Bonorum Possessiones*, and many other things without a good knowledge of which very many laws are incomprehensible (2). Nevertheless, such branches as are still of use ought to be studied more particularly.

e. The Roman law cannot be studied better than at its sources; the text of the *Institutes* must therefore

(1) We must differ in this respect from Prof. Barbeirac, who, in his *Oratio, de Studio Juris recte instituendo*, thinks we should begin with the *law of nature and of nations*. His argument certainly proves that it should also be studied by the lawyer; but it is a mistaken course to make it precede Roman law.

(2) D. G. van der Keessel, *Oratio, qua disquiritur, an capita illa Juris Romani, quæ in usu hodie non esse dicuntur, in Academicis doceri expediat?* (Gron., 1762.)

be read and re-read; the text of the *Pandects* even, especially in the more convenient order as arranged by POTHIER, deserves every attention. Finally, if the law is learnt from an abridgment—as is usually the case—all the enactments which are cited should be examined, and the authorities for the propositions cited should be referred to. In this way the surest hold of the law is obtained.

*f.* An overwhelming mass of annotation is scarcely so detrimental to the study of any other science as that of Roman law. Reading should therefore at first be confined to an *abridgment*, and to one, or at the utmost two, plain and concise *commentaries*. Larger works, and those treating on disputed legal points, are at the commencement most prejudicial. A knowledge of what is sound law, and derived from undisputed elementary principles, must first of all be acquired.

## SECTION V.

These rules being borne in mind, the student must <sup>Institutes.</sup> commence with the *Institutes of Justinian*. The text should be mastered as much as possible; the *definitions* and *classifications* learnt out of some good *abridgment*—the best to use is that by Böckleman or Westenberg. With each lecture compare the *Greek Paraphrase of Theophilus*, the *Antiquities of Heineccius*, and also his *Recitationes*. A simple and plain *commentary*—and from experience I can recommend that of Borcholten—being added, the student will have enough to read; especially if he has the opportunity of comparing the *dictata* of the professor whose lectures he attended in the morning with these books at night, and



thus to recall to mind what he had heard. Extensive and abstruse commentaries, such as those of *Vinnius* and others, must be reserved until one has become familiar with the elementary principles of the law as they are contained in the *Institutes*.

The *Institutes* must not soon be laid aside; they constitute the foundation upon which everything rests; they must be repeatedly read through and studied. Being more prepared, a more extensive commentary may be taken up, and I most highly recommend that by *Rittershusius* (1).

## SECTION VI.

Pandects.

The study of the *Institutes* being completed, or rather, while it is still being pursued for some little time, the *Pandects* may be taken up. In studying these use as the groundwork the *abridgment* which is lectured upon. Of these, *Van Eck's* or *Westenberg's* is the best. Refer at the same time to the text of the laws which are cited in the abridgment. Read and re-read the *Pandects* of *Pothier* on each title. The *Enarratio* of *Schulting*, and the *Commentaries* of *Noodt* and *Wiesebach*, will be sufficient assistance at first. At this period it is also very useful to set aside a few hours now and then for reading *Schulting's Jurisprudentia Ante-Justinianæa*, and when one is a little more advanced the *Observationes* of *Cujacius* (2). The

(1) It is a pity that the works of this really great man are becoming so scarce; and it would be desirable if a liberal subscription could encourage some publisher to publish his *omnia opera*.

(2) We gladly note the opinion and testimony of H. Grotius, in *Dissert. de Stud. Instit.*, p. 564: "Si percoctam sapientiam et nomen eximium optas, non aliunde Juris Quiritem cognitionem spera-

matchless treasure of true and genuine Roman jurisprudence contained in these two books is almost incredible.

For more advanced students it may also be useful to consult on different points such authors as have treated these subjects more in detail. For example, on the title *De Pactis*, read NOODT, *De Pactis et Transactionibus*; on the Seventh Book of the *Pandects*, consult NOODT, *De Usufructu*; and on wills, the *Interpretationes* of *Averanius*, a man almost unequalled in erudition and power of criticism. Professors would do well to mention in their lectures on the *Pandects* the names of one or two of the best authors on each branch whom their pupils might consult. We had almost forgotten to recommend also to the more advanced student the *Commentarius ad Cod. Theodos.*, by J. GOTHOFREDIUS.

## SECTION VII.

The study of so much of the law as does not admit of doubt (*jus certum*) can scarcely be dwelt upon too long. For this, when well understood, must be the means whereby disputed points in law are to be decided; and experience teaches us that half of these controversies owe their origin to the ignorance or misapplication of undisputed legal principles. Still, when the student is fairly familiar with the *Institutes* and *Pandects*—but most decidedly not sooner, or he does himself an incalculable injury—it is

Points of  
controversy  
in the law.

---

quam ex Cujacio, qui solus suffecerit. Adeo ille omnia istius studii arcana pervidit, et quibus è fontibus cuncta fluerent." See also J. Valckenaar, *Oratio, de Scholâ Cujacianâ* (Franeq., 1782).

time to set about reading the *jus controversium*, or the points of controversy of jurisprudence. The *Introductio in Controversias juris Civilis*, by WALCHIUS, is an excellent manual on this subject; and the works of BACHOVIVS, MERENDA and others contain much matter respecting it; and, lastly, all this reading must be perfected by defending and attacking disputed propositions under the direction of a coach who possesses some critical judgment.

### SECTION VIII.

Further studies.

The reading of the different branches of Roman jurisprudence which have been mentioned is quite sufficient for the university course. But the university should not be left until some other branches of jurisprudence have been studied. By these we mean :—

- |                    |  |
|--------------------|--|
| Law of nature.     | 1. The study of the <i>law of nature</i> . In reading this it is best to follow the course of Professor PESTEL, and to consult also the works of GROTIUS and PUFENDORF.  |
| International law. | 2. The study of <i>international law</i> . <i>The Rights of War and Peace</i> , by GROTIUS, ought to be the groundwork; and VATTEL'S work deserves to be highly recommended here. Besides studying this general international law, it is also very useful to make oneself acquainted with the international law of this country. |
| Criminal law.      | 3. The study of <i>criminal law</i> . Although this subject is discussed in the 47th and 48th Books of the <i>Pandects</i> , its importance demands a special treatment. For the University studies some <i>abridgment</i> like that of MEISTER or BOEHMER is sufficient.  |

4. The study of *Canon law*. It is surely absurd Canon law. to style one's self *Doctor of both Laws*, and at the same time to know nothing of the *Canon law*. The university course certainly does not allow time for these subjects to be studied very deeply; but one ought at least to know the *differences between the Civil and the Canon Law*.

5. The study of *modern law*. No better foundation Modern law. exists than the *Introduction* by H. GROTIUS, elucidated by the *Regtsgeleerde Observatiën*, and complemented by the *Theses* of Professor VAN DER KEESSEL.

## SECTION IX.

Our young jurist, who has diligently pursued the Studies after taking degrees. course pointed out, is now capable of taking his doctor's degree. He writes a *treatise* (*dissertatio*) on any juridical subject he pleases, and thus furnishes a proof of the knowledge he has acquired; because to take a degree upon a few *theses*—with which many men are content to pass—is a sign of want of knowledge or of little ambition.

When he has graduated he has a twofold task before him. *Firstly*, to continue and perfect the studies of which the foundation was laid at the university. Then the time has arrived when extensive and abstruse commentaries may be studied with advantage. It now is and remains most necessary to set aside, from time to time, a few hours for reading over again the elementary principles of jurisprudence, as if he were still at the university. The study of Professor VOET'S *Commentary on the Pandects*, who has specially treated of the binding force of the Roman law at the



present day, and who is deservedly a very great authority in our courts, cannot be sufficiently recommended. *Secondly*, he must pursue a course of study in other branches, which will teach him both *Law* and *Procedure*.

In law.

With respect to *LAW*, he must consult the printed *opinions* and *judgments* which have been published. Let him study such cases as seem to him remarkable, by the aid of the elementary principles in which he has been grounded, and thus exercise his mind in *correctly applying the law*, which after all makes the true lawyer. And, as a man's memory cannot retain all the important matter he gathers from different books, let him use a *book of legal opinions*, arranged in alphabetical order; or, what is perhaps much better, let him have a copy of Voet's *Commentary* interleaved with white paper, and note down in their proper places, and according to the order of the subjects, the remarkable passages out of other authors. In this manner he will make the best use of his library, and in actual cases can immediately refer to the best authorities without wasting his time in looking them up.

Further, he must apply himself to particular branches of law which, owing to their daily use, deserve a more thorough knowledge. And specially, let him read with diligence the *criminal law*, which is daily of such incalculable importance in maintaining order and security in society. And as this branch has been treated with more knowledge of mankind since *Farinacius*, *Julius Clarus*, and *Carpzovius* wrote, he should become familiar with the books of later authors who wrote on this subject. The works of *Boehmer*, *Quistorp*, and others will smooth the way for him. As, moreover,

our country is a land of commerce, and mercantile cases have, as it were, a peculiar kind of *analogy*, he should not neglect to make a special study of *mercantile law*, and, in particular, of the law relating to *shipping* and *bills of exchange*.

However well prepared the student may now be in *law*, he has still a difficult task to perform, viz., to study *PROCEDURE*. *Procedure* is of two kinds, *theoretical* and *practical*. In order to acquire the *theoretical* knowledge, read the authors on the *mode of procedure*. I may venture to recommend my *Treatise on Legal Procedure* (*Verhandelng over de Judiciële Practijk*) on the testimony borne by others (*laus enim propria sordet*) as a suitable manual. When this is well understood, the works of MERULA, VAN ALPHEN, and others may be consulted with advantage.

After a good foundation has been laid, the study of the *practical* part of procedure must complete the whole. Reading and studying the printed *Memoriën*, *Deductiën*, and other legal records which have been published—the papers used in decided cases, with the *pleadings* and written *arguments* (1), so far as they can be obtained : a constant attendance at the Roll Courts and trials of actions ; and, lastly, entering the chambers of some experienced and practised lawyer—these are the true ways and means which are eventually capable of creating the *advocate*, according to the picture which the immortal Henry de Groot (2), himself a barrister, has so beautifully drawn in the following epigram :—

“ Qui sancta sumis arma civilis togæ,  
Cui se reorum capita, fortunæ, decus,

(1) *Pleit-Memoriën*.

(2) H. Grotii *Epigramm.*, Lib. I., *Inter ipsius Poëmata*, p. 224.

Tutanda credunt, nomini præsta fidem.  
 Juris sacerdos, ipse dic causam tibi,  
 Litemque durus arbiter præjudica.  
 Voto clientum jura metiri time,  
 Nec quod colorem patitur, id justum puta.  
 Peccet necesse est sæpe, qui nunquam negat."

This epigram has thus been translated rather elegantly into Dutch verse : (1)—

"Rechtspriester, die u zelf der pleitzaal hebt gewijd,  
 Wien ongelukkigen, hun eer, hun goed, hun leven,  
 Om die te veiligen, geheel in handen geven,  
 Toon, dat gij, ongekreukt, dien eernaam waardig zijt.  
 Beslisch eerst bij u selv' de zaak, naar 't strengste recht,  
 Die u wordt voorgesteld, wagt u, in 't oordeelvellen,  
 Den wil van uw Cliënt, of schijn, voor recht te stellen.  
 Die niemand afwijst, is ook vaak der schurken knecht."

## CHAPTER II.

### FOUNDATION OF A SELECT LAW LIBRARY.

#### SECTION I.

Knowledge  
of books.

JUST as difficult as it is for a mechanic to do his labour, for an artist to execute his work, for a surgeon to perform his operations, without being provided with the necessary instruments and tools, so difficult it is to attain to the necessary degree of learning without *books*.

It is not a matter of indifference what books are made use of. Bad ones mislead us; indifferent books often cause more vexation than assistance; the best books alone can be of use to us. This is particularly the case with respect to *law books*, which it is most important to select with care.

(1) Vide *Den Denker*, I. Deel, No. 17, bl. 136.

A guide to such choice may be found in B. G. STRUVII *Bibliotheca Juris selecta, cum emendationibus* C. G. BUDERI (*Jenæ*, 1756), in 8vo.

E. C. WESTPHAL'S *Systematische Anleitung zur kenntnisz der besten Bücher in der Rechtsgelahrtheit* (*Leipz*, 1791), in 8vo.

If a general catalogue of all the books which have ever been written on jurisprudence be required, refer to M. LIPENII *Bibliotheca realis Juridica, cum Supplementis* (*Lips.*, 1757-1789), 4 vols. in fol.

## SECTION II.

First of all, however, we ought shortly to mention <sup>Preparatory studies,</sup> those books which relate to the *preparatory studies*.

### I. The *Latin* language.

Among the *classic authors*, the preference should be given to those who at the same time instruct us in sciences, as EUTROPIUS for *Roman History*, JUSTINUS for *General History*. For sound and elegant Latinity NEPOS, the *Orations* and *Letters* of CICERO and his *De Officiis* deserve our recommendation.

Select as a dictionary for daily use—

J. J. G. SCHELLERI *Lexicon Latino Belgicum Auctorum Classicorum, curante* D. RUHNKENIO.  
L. B., 1799, 2 vols. in 4to.

And for those who need not mind the expense, an indispensable book is—

J. FACCIOLATI *Totius Latinitatis Lexicon. Patav.*  
1771, 4 vols. in fol. (1).

(1) The world is crammed with many useless books. Why is this incomparable treasure of learning, which every one ought to possess, not made more easy of access by the publication of a new edition?



These dictionaries, however, contain only the Latinity of the Golden and Silver ages; but sometimes a knowledge of the meaning of words of the Iron age is necessary; and for this purpose add to other dictionaries—

J. M. GESNERI *Novus Linguae Latinæ Thesaurus*.  
*Lips.*, 1749, 4 vols. in fol.

In order to cultivate a sound Latin style read—

J. G. HEINECH *Fundamenta Stili cultioris*. *Lips.*,  
1766, in 8vo.

J. J. G. SCHELLERI *Præcepta Stili bene Latini*,  
*imprimis Ciceroniani*. *Lips.*, 1784, 2 vols. in 8vo.

II. The *Latinity* of the old Roman JURISTS:—

C. A. DUKER, *De Latinitate Veterum Jurisconsultorum*. *L. B.*, 1711, in 8vo.

Law Lexicons will also be found useful on this subject:—

J. CALVINI *Lexicon Juridicum*. *Coll. All.*, 1734, in  
fol.

B. BRISSONIUS, *De Veborum Significatione*. *Hal.*  
*Magd.*, 1743, in fol.

B. P. VICAT, *Vocabularium utriusque*. *Neap.*,  
1760, 4 vols. in 8vo.

III. The *Greek* Language.

For this purpose it is sufficient to recommend—

J. D. À LENNEP, *Etymologicum Linguae Græcæ*,  
*cum animadversionibus* E. SCHEIDII. *Traj.*, 1790,  
2 vols. in 8vo.

————— *Analogia Linguae Græcæ*. *Ibid.*, 1790,  
in 8vo.

And as Dictionaries—

B. HEDERICI, *Græcum Lexicon Manuale*, curante  
J. A. ERNESTI. *Lips.*, 1788, in 8vo.

J. SCAPULÆ, *Lexicon Græco-Latinum*. Amst., 1687,  
in fol.

#### IV. Roman History :

EUTROPII *Breviarium Historiæ Romanæ*, cum not.  
var. et H. VERHEYK. L. B., 1762, in 8vo.

——— *idem* cum not. var. et C. H. TSCHUCKE.  
Lips., 1796.

G. H. NIEUPOORT, *Historia Republicæ et Imperii  
Romanorum*. Traj., 1723, 2 vols. in 8vo.

R. VAN HAMELSVELD, *Romeinsche Geschiedenissen  
van M. STUART verkort, in vier Deelen*. Amst.,  
1805, in 8vo.

STUART'S great work certainly merits the highest  
praise, but it is too extensive for the young student.

#### V. Roman Antiquities :

G. H. NIEUPOORT, *De ritibus Romanorum*. Traj.,  
1774, in 8vo.

S. PITISCI, *Lexicon Antiquitatum Romanarum*.  
Hag. Com., 1737, 3 vols. in fol.

Especially those *Antiquities* which it is most necessary  
the jurist should know, as they serve to elucidate the  
obscurities of the Roman Laws.

J. C. HEINECCII *Antiquitates Romanæ*. Leov.  
1778, in 8vo.

J. GUTHERIUS, *De Officiis Domus Augustæ*. Lips.,  
1662, in 8vo.

#### VI. The History of Roman Law :

J. V. GRAVINÆ, *Origines Juris Civilis ; in ipsius  
Operibus*. Venet., 1739, in 4to.

J. C. HEINECCII *Historia Juris Civilis Romani ac  
Germanici*. L. B., 1470, in 8vo.

J. A. BACHII (1) *Historia Jurisprudentiæ Ro-*

(1) This is the best manual on this subject, and cannot be studied  
too much.

*manæ, cum observ.* A. C. STOCKMANN. *Lips.*, 1796, in 8vo.

J. BERTRANDUS, *De Jurisperitis.* L. B., 1675, in 8vo.

G. MASCOVIUS, *De Sectis Sabinianorum et Proculianorum.* *Lips.*, 1728, in 8vo.

VII. A general knowledge of *Philosophy* :

J. A. ERNESTI *Initia Doctrinæ Solidioris.* *Lips.*, 1783, in 8vo.

J. M. GESNERI *Isagoge in Eruditionem universalem.* *Lips.*, 1784, 2 vols. in 8vo.

Especially of *Logic* :

D. VAN DE WYNPERSE, *Institutiones Logicæ.* L. B., 1779, in 8vo.

I. WATTS, *Logica, of onderwijs van 't recht gebruik der Reden.* 's Hage, 1768, in 8vo.

————— *Verhandeling over de oeffening en bescharing van 't Verstand.* *Ibid.*, 1766, in 8vo.

Of *Mathematics* :

EUCLIDIS *Elementa*, edente J. H. VAN LOM. *Amst.*, 1738, in 8vo.

P. STEENSTRA, *Grondbeginzels der Meetkunst.* *Leijd.*, 1797, in 8vo.

J. H. VAN SWINDEREN, *Grondbeginzels der Meetkunde.* *Amst.*, 1790, in 8vo.

Of *Ethics or Moral Philosophy* :

S. PUFENDORF, *De Officio hominis et civis.* L. B., 1769, 2 vols. in 8vo.

VIII. The knowledge of *modern or living languages* ; and in particular of—

a. The *French* language.

Of the innumerable GRAMMARS we prefer—

RESTAUT, *Grammaire Française.* *Paris*, 1786, in 12mo.

And of the *Dictionaries*—

P. MARIN, *Fransch en Nederduitsch Woordenboek*,  
Amst., 1793, 2 Deelen, in 4to.

*Dictionnaire de l'Académie Française*. Nismes, 1787.  
2 vols. in 4to.

While for information concerning the *technical terms*  
of almost all sciences there is no book like—

*Le Dictionnaire de Trevoux*. Paris, 1752. 7 vols.  
in fol.

b. The *German language*.

Among the *GRAMMARS* we recommend—

J. C. GOTTSCHED, *De Hoogduitsche Spraakmeester*,  
Amst., 1786.

J. C. ADELUNGII *Grammatica Theodisca*. Lips.  
1738.

And the *Dictionaries*—

*Nouveau Dictionnaire Allemand-François et Fran-  
çois-Allemand, à l'usage des deux nations*.  
Strasb., 1800, 2 vols. in 4to.

J. G. HAAS, *Neues Teutsches und Französisches  
Wörterbuch*. Leipz., 1786, 3 Theile, in 8vo.

While the best book, without doubt, and one which  
is indispensable for those who wish to learn *German*  
thoroughly, is—

J. C. ADELUNG, *Grammatisch-Kritisches Wörter-  
buch der Hochdeutschen Mundart*. Leipz., 1793.  
4 Theile, in 4to.

c. The *Dutch language*.

As the refinement of this language attracts so much  
attention at present, the following works should be  
constantly used—

M. SIEGENBEEK, *Verhandeling over de Neder-  
duitsche Spelling*. Amst., 1804, in 8vo.



P. WEILAND, *Nederduitsche Spraakkunst, ten dienste der Scholen.* Amst., 1806, in 8vo.

———— *Nederduitsche Taalkundig Woordenboek.* Amst., 1799, . . Deelen, in 8vo.

To which add, for more thorough research—

L. TEN KATE, *Aanleiding tot de Neiderduitsche Sprake.* Amst., 1723, 2 Deelen, in 4to.

B. HUYDECOPER, *Proeve van Taalb- en Dichtkunde.* Leijd., 1782, 4 Deelen, in 8vo.

D. VAN HOOGSTRATEN, *Zelfstandige Naamwoorden,* vermeerderd door A. KLUIT. Amst., 1793, in 8vo.

The *History* of this country—

I. OFFERHAUS, *Compendium Historiæ Fœderati Belgii.* Gron., 1763, in 8vo.

*Vaderlandsche Historie verkort, en vervolgd tot* 1787. Amst., 1792, 2 Deelen, in 8vo.

J. WAGENAAR, *Vaderlandsche Historie*, 21 Deelen —met de *Vervolgen*.

Also a knowledge of the *Constitution* as it existed at different periods, which is very beautifully described in—

F. W. PESTEL, *Commentarii de Republicâ Batavâ.* L. B., 1795, 3 vols. in 8vo.

And for its condition at the present day study the last *Constitution* and the subsequent *Decrees*.

### SECTION III.

Roman law.

In order to enumerate the works relating to jurisprudence in proper order, we commence with the *Roman law*:

I. As it existed before the time of the Emperor JUSTINIAN.

J. GOTHOFREDUS, *Ad Legis XII. Tabularum fragmenta*. Genev., 1653, in 4to., et in OTTONIS *Thesauro*, Tom. 3.

C. RITTERSHUSIUS, *Ad Legem XII. Tabularum Argent.*, 1616, in 4to.

BOUCHAUD, *Commentaire sur la Loi des Douze Tables*. Paris, 1787, in 4to.

A. SCHULTINGII *Jurisprudentia Ante-Justinianæa*. L. B., 1717, in 4to.

J. GOTHOFREDI, *Codeæ Theodosianus*, edente RIT-TERO. Lips., 1736, 6 vols. in fol.

## II. The best editions of the *Corpus Juris* or JUSTINIAN'S Code—

*Corpus Juris Civilis Glossatum*. Lugd., 1612, 6 vols. in fol.

*Corpus Juris Civilis, cum notis* D. GOTHOFREDI et S. VAN LEEUWEN. Amst., 1663, in fol.

*Corpus Juris Civilis, ex recensione* G. C. GEBAUERI. Gott., 1778, 2 vols. in 4to.

*Corpus Juris Civilis*. Amst., 1664, 1681, vel 1700, in 8vo.

## III. The *Institutes*—

*Institutiones Justiniani, cum notis* A. VINNII. L. B., 1753, in 8vo.

THEOPHILI *Paraphrasis Institutionum, cum not var. et* G. O. REITZ. Hag. Com., 1751. 2 vols. in 4to.

## Abridgments of the *Institutes*—

J. F. BÜCKLEMANNI *Compendium Institutionum*. Amst., 1802, in 8vo.

J. O. WESTENBERG, *Principia Juris secundum ordinem Institutionum*. L. B., 1766, in 8vo.

J. G. HEINECCHII *Elementa Institutionum*. Amst., 1728, in 8vo.

J. VAN MUYDEN, *Compendium Institutionum, cum notis E. OTTONIS*. Traj., 1737, in 8vo.

A. PEREZII *Erotemata ad Institutiones*. Amst., 1669, in 12mo.

Commentaries on the *Institutes*—

J. G. HEINECCII *Recitationes in Elementa Institutionum*. Leov., 1773, in 8vo.

J. BORCHOLTEN, *Ad Institutiones*. Genev., 1639, in 4to.

C. RITTERSHUSIUS, *Ad Institutiones*. Argent., 1649, in 4to.

E. OTTO, *Ad Institutiones*. Traj., 1729, in 4to.

J. À COSTA, *Ad Instituta, curante J. VAN DE WATER*. L. B., 1744, in 4to.

A. VINNII *Commentarius ad Instituta, ex editione J. G. HEINECCII*. Lugd., 1767, in 4to.

J. J. WISSENBAACH, *Disputationes ad Instituta*. Franeg., 1700, in 4to.

IV. The *Pandects*—

R. J. POTHIER, *Pandectæ Justinianæ, in novum ordinum digestæ*. Lugd., 1782, 3 vols. in fol.

*Basilica* FABROTTI, cum RUHNKENII *Supplemento*. Paris, 1647, et L. B., 1766, 8 vols. in fol.

Abridgments thereof:

C. VAN ECK, *Principia Juris Civilis, secundum ordinem Digestorum*. Traj., 1756, 2 vols. in 8vo.

J. O. WESTENBERG, *Principia Juris, secundum ordinem Pandectarum*. L. B., 1764, in 8vo.

J. G. HEINECCII *Elementa Pandectarum*. Amst., 1728, in 8vo.

Commentaries:

A. SCHULTINGHII *Enarratio primæ partis Pandectarum*. L. B., 1720, in 8vo.

- G. NOODT, *Commentarius ad Pandectas ; in ipsius Operibus*. L. B., 1767, in fol.
- J. J. WISSENBACH, *Exercitationes ad Pandectas*. Franeq., 1661, in 4to.
- J. BRUNNEMAN, *Ad Pandectas*. Francof., 1692, in fol.
- H. ZOEZII *Commentarius ad Pandectas*. Lovan., 1692, in fol.
- J. VOET, *Commentarius ad Pandectas*. Hag. Com., 1707, 2 vols. in fol., cum *Supplemento nostro, cujus Sect. I. prodiit*. Traj., 1793, et reliquæ D. V. sequuntur.
- V. Justinian's *Codex*.
- A. PEREZIUS, *Ad Codicem*. Amst., 1671, in 4to.
- J. BRUNNEMAN, *Ad Codicem*. Lips., 1688, in fol.
- J. J. WISSENBACH, *Commentarius in Codicem*. Franeq., 1665, 2 vols. in 4to.
- VI. The *Novellæ* of Justinian.
- J. J. HOMBERGK, *Novellæ Constitutiones Justiniani*. Marb., 1717, in 4to.
- C. RITTERSHUSIUS, *Ad Novellas*. Argent., 1615, in 4to.
- C. F. ZEPERNICK, *Delectus Scriptorum, Novellas Justiniani illustrantium*. Hal., 1783, in 8vo.

## SECTION IV.

In order to study Roman law thoroughly one ought to be able to consult, besides the above-mentioned *general commentaries*, the best authors who have treated of *special laws* or different branches of the law. To arrange all these in detail in their proper classification would make this *Introduction* much too

Authors on  
special  
branches of  
the law.



prolix; so that I have thought it best to give an alphabetical list of the remaining most necessary books which treat of Roman law, either as regards the *entire system* or its *particular branches*, since those who have already made themselves familiar with the *Institutes* and the *Pandects* will have little trouble in judging how they should make use of each of such books.

In folio—

- B. BRISSONIUS, *De Formulis et solemnibus Populi Romani verbis, ex recensione J. A. BACCHIL. Lips.*, 1755.
- C. VAN BYNKERSHOEK, *opera omnia. L. B.* 1767.
- F. CONNANI *Commentarii Juris Civilis. Neap.*, 1724.
- J. CUJACII *opera omnia ex editione C. A. FABROTTI. Neap.*, 1758, 2 vols.
- J. DOMAT, *Les Loix Civiles dans leur ordre naturel. Paris*, 1745.
- H. DONELLI *Commentarii Juris Civilis. Francof.*, 1626.
- *Commentarii ad Codicem. Ib.*, 1599.
- F. DUARENI *opera omnia. Aurel. Allobr.*, 1608.
- A. FABRI *Rationalia in Pandectas. Lugd.*, 1659, 6 tom. 4 vol.
- *Conjecturæ Juris Civilis. Lugd.*, 1661; *et Jurisprudentiæ Papinianæ scientia. Lugd.*, 1658.
- J. GOTHOFREDI *Opera Juridica minora, ex editione C. H. TROTZ. L. B.*, 1733.
- O. HILLIGERI *Donnellus enucleatus. Antw.*, 1642.

*Jurisprudentia Romana et Attica, cum præfatione*

J. G. HEINECCII. L. B., 1731, 3 vols.

G. MEERMAN, *Novus Thesaurus Juris Civilis et canonici, cum Supplemento. Hag. Com.*, 1751, 8 vols.

E. OTTONIS, *Thesaurus Juris Romani. Traj.*, 1733, 5 vols.

#### In quarto.

G. D'ARNAUD, *Variæ Conjecturæ. Leov.*, 1744.

J. F. BÖCKLEMAN, *Commentarii in Digesta et de Actionibus. Traj.*, 1694, 2 vols.

J. H. BOEHMERI *Exercitationes ad Pandectas. Gott.*, 1764, 6 vols.

P. C. BREDERODII *Repertorium Sententiarum. Francof.*, 1664 (1).

J. CANNEGIETER, *Fragmenta Ulpiani et Observationes. L. B.*, 1774.

H. CANNEGIETER, *Commentarius ad Fragmenta veteris Jurisprudentiæ, quæ exstant in Coll. L. L. Mos. et Rom. Franeq.*, 1765.

C. COCCEJI *Exercitationes curiosæ. Lemg.*, 1722, 2 vols.

J. À COSTA, *Prælectiones ad illustriores quosdam titulos locaque selecta Juris Civilis, edente B. VOORDA. L. B.*, 1773.

D. FELLENBERG, *Jurisprudentia antiqua. Bern.*, 1760, 2 vols.

J. G. HEINECCII *Commentarius ad Legem Juliam et Papiam Poppæam. Amst.*, 1726.

(1) This book is particularly useful for finding with ease any law required, and is to an advocate what a *Concordance of the Bible* is to a clergyman. It deserves the greater recommendation, as the author possessed a thorough and accurate knowledge of the law.

- U. HUBERI *Prælectiones Juris Civilis, cum additionibus* C. THOMASII. *Francof.*, 1749, 3 vols.
- *Digressiones Justinianæ.* *Franeq.*, 1696.
- *Eunomia Romana.* *Amst.*, 1724.
- M. LYCKLAMA À NYEHOLDT, *Membranæ.* *Leov.*, 1644.
- E. MERILLII *Opuscula varia.* *Neap.*, 1720.
- J. MEIJERI *Collegium Argentoratense.* *Argent.*, 1657, 3 vols.; et G. BICCHII *Collegium Argentoratense enucleatum.* *Argent.*, 1664.
- E. OTTONIS, *Dissertationes Juris Publici et Privati.* *Traj.*, 1723.
- A. SCHULTINGII *Dissertationes.* *L. B.*, 1714.
- E. SPANHEMII *Orbis Romanus.* *Hal.*, 1728.
- G. A. STRUVII *Syntagma Jurisprudentiæ.* *Francof.*, 1692, 2 vols.
- P. TOULLIEU, *Collectanea.* *Gron.*, 1737.
- A. VINNI *Tractatus quinque.* *Traj.*, 1697.
- C. F. WALCHII *Opuscula.* *Hal. Magd.*, 1785, 3 vols.
- J. VAN DE WATER, *Observationes Juris Romani.* *Traj.*, 1713.

## In octavo.

- J. AVERANII *Interpretationes Juris.* *L. B.*, 1753, 3 vols.
- E. BRONCKHORST, *De Regulis Juris.* *L. B.*, 1624.
- C. H. ECKHARD, *Hermeneutica Juris.* *Lips.*, 1779 (1).

(1) We must recommend this book as an invaluable *manual* to the student of Roman law. The repeated reading and studying of this work will be of the greatest use.

- C. F. GLUCK, *Ausführliche Erläuterung der Pandecten. Erl.*, 1797, . . Theile.
- J. GOEDDÆUS, *De Verborum Significatione. Herb.*, 1614.
- C. F. HOMMELII *Corpus Juris Civilis, cum not. var. Lips.*, 1768.
- *Palingenesia Librorum Juris veterum. Lips.*, 1767, 3 vols.
- *Litteratura Juris. Lips.*, 1779.
- S. H. VAN IDSINGA, *Varia Juris Civilis. Harl.*, 1737.
- A. LEYSERI *Meditationes ad Pandectas. Hal.*, 1772, 12 vols.—*Exstat etiam editio in 4to.*
- Æ. MENAGII *Amœnitates Juris Civilis. Traj.*, 1725.
- E. MERCERII *Conciliator. Berol.*, 1722.
- E. OTTO, *De Tutela Viarum Publicarum. Traj.*, 1731.
- *De Ædilibus Coloniarum et Municipiorum. Lips.*, 1732.
- *Jurisprudentia Symbolica. Traj.*, 1730.
- *Papinianus. L. B.*, 1718.
- G. PAUW, *Observationes Juris Civilis. Hag. Com.*, 1743.
- J. L. E. PUTMAN, *Interpretationes et Observationes. Lips.*, 1763.
- *Probabilia Juris Civilis. Lips.*, 1768.
- *Adversaria Juris universi. Lips.*, 1775, 3 vols.
- *Variorum Opusculorum Sylloge. Lips.*, 1786.
- J. C. RUCKER, *Dissertationes, Observationes, et Orationes. L. B.*, 1749.



- R. RYGERBOS, *Observationes Juris Romani*. Amst., 1743.
- A. SCHULTINGHII *Notæ ad Digesta seu Pandectas, edente N. SMALLENBERG*. L. B., 1804, Tom. I.
- *Notæ in tit. D. de Verb. Sign. et de Reg. Jur. edente N. SMALLENBERG*. L. B., 1799.
- C. SIGONIUS, *De antiquo Jure Populi Romani Lips.*, 1715, 2 vols.
- J. VOORDA, *Interpretationes et Emendationes Juris Romani*. Traj., 1735.
- *Electa*. Traj., 1749.
- H. G. VAN VRYHOF, *Observationes Juris Civilis Amst.*, 1747.
- J. O. WESTENBERG, *De Causis Obligationum Harder.*, 1704.
- A. WIELING, *Jurisprudentia restituta*. Amst., 1727.
- *Lectiones Juris Civilis*. Traj., 1740.

## In duodecimo.

- C. O. À BOECKELEN, *Opuscula*. L. B., 1678.
- A. DUCK, *De usu et auctoritate Juris Civilis*. Lips., 1676.
- J. GOTHOFREDI, *Manuale Juris*. L. B., 1676.
- H. GROTH *Florum Sparsio*. Amst., 1643.
- C. A. RUPERTUS, *Ad Enchiridion Pomponii*. Franeq., 1696.
- J. J. WISSENBAACH, *De Verborum Significatione*. Franeq., 1654.
- *De Regulis Juris*. Franeq., 1656.

## SECTION V.

The above-mentioned *commentaries* will, in general, <sup>Points of controversy</sup> serve for dealing with controversies or disputed points <sup>the law.</sup> of Roman law ; but, besides these, some writers have written special treatises on these points, of which we recommend the following :—

C. VAN ECK, *Theses Juris controversi.* L. B., 1775, in 8vo.

A. SCHULTINGII *Theses controversæ.* L. B. 1738, in 8vo.

H. TREUTLERI *Selectæ Disputationes.* Marp., 1666, in 4to.

R. BACHOVII *Notæ ad Treutlerum.* Heidelb., 1617, 3 vols. in 4to.

H. GIPHANII *Antinomix Juris Civilis.* Francof., 1666, in 4to.

A. FACHINEI *Controversiæ Juris.* Col., 1660, in 4to.

G. A. STRUVII *Evolutiones Controversiarum.* Francof., 1684, in 4to.

A. VINNII *Selectæ Quæstiones : inter ipsius Tract. V. supra memoratos.*

E. BRONCKHORST, *Centuriæ Sex.* Franeg., 1695, in 8vo.

S. COCCEJI *Jus Civile controversum.* Francof., 1740, 2 vols. in 4to.

A. MERENDÆ, *Controversiæ Juris.* Bruæel., 1745, 5 vols. in fol.

C. F. WALCHII *Introductio in Controversias Juris Civilis.* Jenæ, 1791, in 8vo.

B. ZOUCHI *Quæstiones Juris Civilis.* Lond., 1682, in 12mo.

## SECTION VI.

Law of nature  
and inter-  
national law.

It would be very easy to give a long list of works relating to the *law of nature* and *international law*, especially if the *statistics* of the different European countries were added, but it is sufficient for our purpose to point out the following authors:—

H. GROTIUS, *De Jure Belli ac Pacis; cum notis*  
J. F. GRENOVII et J. BARBEIRACII. *Amst.*,  
1720, in 8vo.

————— *cum Commentario* H. et S. DE COCCEJI.  
*Lausan.*, 1751, 5 vols. in 4to.

————— *Le Droit de la Guerre et de la Paix*, par  
J. BARBEIRAC. *Leid.*, 1759, 2 vols. in 4to.

S. PUFENDORF, *De Jure Naturæ et Gentium, ex*  
*editione* G. MASCOVII. *Francof.*, 1759, 2 vols.  
in 4to.

————— *Le Droit de la Nature et des Gens*, par  
J. BARBEIRAC. *Amst.*, 1734, 2 vols. in 4to.

J. SCHEFFERI *Grotius enucleatus*. *Gron.*, 1771,  
in 8vo.

F. W. PESTEL, *Fundamenta Jurisprudentiæ natu-*  
*ralis*. *L. B.*, 1788, in 8vo.

J. G. HEINECCHII *Elementa Juris Naturæ et Gentium*.  
*Hal.*, 1758, in 8vo.

P. R. VITRIARII *Institutiones Juris Naturæ et Gen-*  
*tium*. *L. B.*, 1749, in 8vo.

R. CUMBERLAND, *Loix de la Nature*, par J. BAR-  
BEIRAC. *Leid.*, 1757, in 4to.

C. WOLFFII *Jus Naturæ*. *Francof.*, 1740, 8 vols.  
in 4to.

————— *Jus Gentium*. *Hal. Madg.*, 1749, in 4to.

C. WOLFFII *Institution du Droit de la Nature et des Gens*, par E. LUZAC. *Leid.*, 1772, in 4to.

E. OTTONIS *Notitia præcipuarum Europæ Rerum-publicarum*. *Traj.*, 1739, in 8vo.

DE VATTEL, *Le Droit des Gens*. *Leid.*, 1758, in 4to.

MONTESQUIEU, *De l'Esprit des Loix*. *Genev.*, 1753, 3 vols. 8vo.

G. FILANGIERI, *La Science de la Législation*. *Paris*, an VII., 7 vols. in 8vo.

G. NOEST, *Algemeen Staats-recht*. *Amst.*, 1753, in 4to.

## SECTION VII.

Scarcely any of the old authorities on *criminal law* Criminal law. deserve our commendation. As a rule they contain a great mass of annotations which confuse rather than illustrate; and almost all show signs of the lower state of civilisation of the period in which they were written. Since mankind has commenced to treat the subject of penal law more *philosophically*, and with *greater knowledge of mankind*, it has assumed quite a different form; and in order to acquire, in this spirit, a knowledge of this important branch of law, it will be sufficient to mention the following authors:—

A. MATTHÆUS, *De Criminibus*. *Amst.*, 1661, in 4to.

B. CARPZOVII *Practica rerum Criminalium, cum Observationibus* J. S. F. BOEHMERI. *Francof.*, 1758, 3 vols. in fol.

D. CLASENIUS, *In Constitutiones Criminales Caroli V.* *Francof.*, 1693, 4to.

J. S. F. BOEHMERI *Meditationes in Constitutionem Criminalem Carolinam*. *Hal. Madg.*, 1774, in 4to.



- J. S. F. BOEHMERII *Elementa Jurisprudentiæ Criminalis*. Hal., 1774, in 8vo.
- C. J. HEILS, *Judex et Defensor in processu inquisitionis, seu Tractatus Criminalis Theoretico-Practicus*. Hildb., 1768, in 4to.
- J. L. BANNIZA, *Delineatio Juris Criminalis*. Oenip., 1773, 2 vols. in 8vo.
- D. H. KEMMERICH, *Synopsis Juris Criminalis*. Pisis., 1768, in 8vo.
- C. F. G. MEISTER, *Principia Juris Criminalis*. Lips., 1781, in 8vo.
- J. L. E. PUTMAN, *Elementa Juris Criminalis*. Lips., 1779, in 8vo.
- DE BECCARIA, *Traité des Délits et des Peines*. Amst., 1766, in 8vo.
- E. C. WIELAND, *Geist der Peinlichen Gesetze*. Leipz., 1783, 2 Theile, in 8vo.
- J. C. E. VON QUISTORP, *Grundsätze des Deutschen Peinlichen Rechts*. Rost., 1792, 2 Theile, in 8vo.
- N. GROLMAN, *Grundsätze des Criminalrechts Wissenschaft*. Giess., 1798.
- *Bibliothek für die Peinliche Rechtswissenschaft und Gesetzkunde*. Herb., 1798. . . Theile.

## SECTION VIII.

The Canon law. To pay special attention to the *Canon law* would be a study in itself. Nor is it essentially necessary for a lawyer; but it would be a great misfortune to be entirely ignorant of it. A middle course should therefore be pursued in this case; and the following books will be of assistance:—

*Corpus Juris Canonici, ex editione J. H. BOEHMERI*. Hal. Magd., 1747, in 4to.

- J. F. GIBERT, *Corpus Juris Canonici, per regulas naturali ordine digestas*. Lugd., 1737, 3 vols. in fol.
- J. À COSTA, *Commentarii in Decretales Gregorii IX*. Paris, 1676, in 4to.
- C. RITTERSHUSII *Differentiæ et Juris Civilis, et Canonici*. Argent., 1668, in 4to.
- J. F. BOCKELMAN, *De differentiis Juris Civilis, Canonici et Hodierni, cum notis E. OTTONIS*. Traj., 1737, in 8vo.
- J. H. BOEHMERI *Jus Ecclesiasticum Protestantium*. Hal., 1720, 5 vols. in 4to.
- *Institutiones Juris Canonici*. Hal., 1760, in 8vo.
- G. VON MASTRICHT, *Historia Juris Ecclesiastici*. Amst., 1686, in 8vo.

## SECTION IX.

The authorities on *modern law* and *procedure* have Modern law. still to be noticed. According to the spirit in which we have throughout treated this work, we understand by that the *Law of Holland* and the *Procedure of the Courts of Holland*.

As to the law, besides the above-mentioned *Commentary* by PROF. VOET, the following works may be used :—

## Latin.

- S. VAN LEEUWEN, *Censura Forensis, ex editione G. DE HAAS*. L. B., 1741, in fol.
- S. À GROENEWEGEN, *De Legibus abrogatis*. Amst., 1669, in 4to.

G. R. AB OOSTERGA, *Censura Belgica ad Pandectas Traj.*, 1661, 2 vols. in 4to.

———— *Censura Belgica ad Codicem. Traj.*, 1666, in 4to.

———— *Censura Belgica ad Institutiones. Traj.*, 1648, in 8vo.

P. VOET, *Commentarius ad Institutiones. Gorinch.*, 1668, 2 vols. in 4to.

P. GUDELINUS, *De Jure novissimo. Arnh.*, 1661.

P. ZYPÆI *Notitia Juris Belgici. Antw.*, 1640, 4to.

H. J. ARNTZENII *Institutiones Juris Belgici Civilis. Gron.*, 1783, 3 vols. in 8vo.

D. G. VAN DER KEESSEL, *Theses selectæ Juris Hollandici et Zeelandici. L. B.*, 1800, in 4to.

### Dutch.

Among these the first place belongs to the *Placaats of the Land*. For those relating to the period of the *Government of the Counts* refer to—

F. VAN MIERIS, *Groot Charterboek der Graven van Holland. Leid.*, 1753, 4 Deelen, in fol.

Those in force during the *States-Government* are included in—

CAU en SCHELTUS, *Placaat-Boek van de Staaten Generaal, van Holland, en van Zeeland*, 9 Deelen ; als mede het *Generaal Register*, door J. VAN LINDEN. 's Hage, 1641–1770, et Amst., 1797, in fol.

The Revolution of 1795 and the subsequent insurrections also gave birth to different laws, which are all to be found together in—

*Verzameling van Publicatiën voor de Ingezetenenen der Bataafsche Republiek. Leijd.*, 1795, 18 Deelen, in 8vo.

Those subsequently published must be collected from time to time.

Besides the *laws of the land*, one should be provided with the *local laws* as they exist in the *statutes and ordinances* of towns, districts or villages, which are sufficiently well known without my extending this *Introduction* by mentioning them.

In studying *modern law* use should moreover be made of—

H. DE GROOT, *Inleiding tot de Hollandsche Rechtsgeleerdheid*. Amst., 1738, in 4to.

———— met Aanteekeningen van W. SCHORER. Middelb., 1767, in 4to.

*Regtsgeleerde Observatiën over de Inleiding van* H. DE GROOT. 's Hage, 1777, 4 Deelen, in 8vo.

S. VAN LEEUWEN, *Roomsch Hollandsch Regt, met Aanteekeningen van C. W. DECKER*. Amst., 1780, 2 Deelen, in 4to.

———— *Practijk der Notarissen*. Rott., 1742, 2 Deelen, in 8vo.

U. HUBER, *Hedendaagsche Regtsgeleerdheid*. Amst., 1726, in 4to.

G. VAN WASSENAAR, *Practijk Judicieel en Notariaal*. Utr., 1746, 2 Deelen, in 4to.

E. VAN ZURCK, *Codeæ Batavus, met de vermeerderingen van P. VAN DER SCHELLING*. Leid., 1764, in 4to.

A. LYBRECHTS, *Redeneerend Vertoog en Practijk over 't Notaris-Ambt: met de Aanmerkingen*. Amst., 1780, 4 Deelen, in 4to.

J. SCHOOLHOUDER, *Oeffenschol der Notarissen*. 's Hage, 1750, in 8vo.



## SECTION X.

Writers on  
special  
branches.

For carrying on the study of the modern law and for its practice it is most necessary to possess the principal works of those who have treated of special branches of the law, especially as it exists at the present day. It is impossible to give a complete list ; besides, tastes differ on this point. I shall therefore content myself with pointing out the following books, as most necessary :—

## Latin.

- A. FABER, *De Erroribus Pragmaticorum*. Lugd., 1658, 2 vols. in fol.  
 A. PECKII *opera omnia*. Antv., 1666, in fol.  
 M. A. GALVANUS, *De Usufructu*. Genev., 1676, in 4to.  
 P. MONTANUS, *De Jure Tutelarum*. Hag. Com., 1656, in 4to.  
 H. FELICIUS, *De Societate*. Gorinch., 1666, in 4to.  
 T. M. DE ESCOBAR, *De Ratiociniis Administratorum*. Francof., 1618, in 4to.  
 A. VAN WEZEL, *opera omnia*. Amst., 1701, in 4to.  
 H. BROUWER, *De Jure Connubiorum*. Delph., 1714, in 4to.  
 C. RODENBURG, *De Jure Conjugum*. Traj., 1653, in 4to.  
 J. CHRISTENIUS, *De Jure Matrimonii*. Harderw., 1651, in 12mo.  
 A. MATTHÆUS, *De Auctionibus*. Traj., 1653, in 4to.  
 ———— *De Probationibus*. Gron., 1653, in 4to.  
 ———— *Parœmiæ*. Traj., 1667, 8vo.

J. A. SOMEREN, *De Jure Novercarum*. Traj., 1661, in 8vo.

———— *De Representatione*. Traj., 1676, in 8vo.

P. VERRYIN, *De Emptione et Ventitione*. Amst., 1676, in 8vo.

J. VOET, *De Rebus mobilibus et immobilibus*. Traj., 1666, in 8vo.

———— *De Familia erciscunda*. Traj., 1674, in 8vo.

To become acquainted, moreover, with the most important matter in the works of the greatest jurists whom *Germany* has produced, the following book will be found by experience to be very useful:—

J. E. J. MULLER, *Promptuarium Juris novum*. Lips., 1792, 7 vols. in 4to.

### Dutch.

P. BORT, *Werken*. Leid., 1731, in fol.

———— *Nagelate Werken*. Utr., 1745, in fol.

*Verhandelingen van 't Genootschap pro excolendo Jure Patrio*. Gron., 1773, 4 Deelen, in 8vo.

P. PECKIUS, *Verhandeling van het hand-opleggen met de Aanteekeningen van S. VAN LEEUWEN*. Amst., 1693, in 4to.

J. COS, *Regtsgeleerde Verhandelingen*. 's Hage, 1733, in 8vo.

H. VAN DER VORM, *Verhandeling van het Versterf-recht, vermeerderd door V. J. BLONDEEL*. Amst., 1774, in 8vo.

R. J. POTHIER, *Verhandeling van het Wisselrecht*. Leid., 1801, in 8vo.

R. J. POTHIER, *Verhandeling van het Recht omtrent Sociëteiten of Compagnieschappen. Ibid.*, 1802, in 8vo.

———— *Verhandeling van Legaten. Ibid.*, 1803, in 8vo.

———— *Verhandeling van Contracten en andere Verbintenissen. Ibid.*, 1804, 2 Deelen, in 8vo.

B. VOORDA, *De Crimineele Ordonnantiën, met Aanmerkingen. Leid.*, 1792, in 4to.

G. FELTMAN, *Aanmerkingen over den Artikel-brief. 's Hage*, 1716, in 8vo.

We ought also to notice here the best authorities on *commerce, navigation, and bills of exchange*; but as we have mentioned them in our *Notes to the Fourth Book of this work*, we refer the reader to those notes, and consider a repetition here as superfluous.

## SECTION XI.

Opinions and cases.

We here recommend most strongly the study of printed *opinions* and *decided cases*. On *opinions* the following books may be used:—

*Hollandsche Consultatiën, met het Amsterdamsch derde Deel, en Kort Begrip. Rott.*, 1661, 8 Deelen, in 4to.

*Vervolg op de Hollandsche Consultatiën. Amst.*, 1780, 2 Deelen, in 4to.

G. DE HAAS, *Nieuwe Hollandsche Consultatiën. 's Hage*, 1741, in 8vo.

J. VAN DER BERG, *Nederlandsch Advis-boek. Campen*, 1781, 4 Deelen, in 4to.

C. VAN DER KOP, *Nieuw Nederlandsch Advis-boek. 's Hage*, 1769, 2 Deelen, in 4to.

*Utrechtsche Consultatiën, met het Kort Begrip. Utr., 1676, 4 Deelen, in 4to.*

NASSAU LA LECQ, *Algemeen Register op de Consultatiën. Utr., 1778, 2 Deelen, in 4to.*

J. M. BARELS, *Crimineele Adviesen. Amst., 1778, in 4to.*

———— *Adviesen over den Koophandel en Zeevaart. Amst., 1780, 2 Deelen, in 4to.*

On *decided cases* the following books are useful:—

A. FABRI *Codex Sabaudicus. Lugd., 1649, in fol.*

P. CHRISTINÆI *Decisiones. Antv., 1671, 6 Tom. in fol.*

C. NEOSTADII *Decisiones utriusque Hollandiæ Curix. Hag. Com., 1667, in 4to.*

J. COREN, *Observationes et Consilia. Amst., 1661, in 4to.*

C. VAN BYNKERSHOEK, *Quæstiones Juris privati. L. B., 1774, in 4to.*

J. LOENIUS, *Decisiën en Observatiën, door T. BOEL. Rott., 1755, in 4to.*

*Decisiën en Resolutiën van den Hove van Holland. 's Hage, 1751, in 4to.*

J. VAN DER LINDEN, *Verzameling van merkwaardige Gewijsden der Gerechtshoven in Holland. Leid., 1803, 1ste Deel, in 8vo.*

J. A. SANDE, *Decisiones Frisicæ. Amst., 1698, in 4to.*

Z. HUBERI, *Observationes rerum judicatarum. Leov., 1723, 2 vols. in 4to.*

———— *Casus enucleati. Franeq., 1712, in 4to.*

S. BEUCKER, *Decisiones supremæ Frisiorum Curix. Leov., 1782, in 4to.*

H. RADELANT, *Decisiones Curix Trajectinæ. Traj., 1637, in 4to.*



P. STOCKMANS, *Decisiones Curix Brabantix. Brux.*, 1670, in 4to.

G. DE WYNANTS, *Supremæ Curix Brabantix Decisiones. Brux.*, 1744, in fol.

## SECTION XII.

### Practice.

At last we come, in conclusion of this *Introduction*, to the *theoretical knowledge of practice* which may be sufficiently gathered from the following books:—

J. VAN DER LINDEN, *Verhandeling over de Judicieele Practijk. Leid.*, 1794, 2 Deelen, in 8vo.

P. MERULA, *Manier van Procedeeren, met de vermeerderingen van D. LULIUS en J. VAN DER LINDEN. Lied.*, 1781, 2 Deelen, in 4to.

W. DE GROOT, *Inleiding tot de Practijk. 's Hage*, 1667, in 4to.—This is also in Latin, entitled G. GROTH *Isagoge ad Praxin Fori Batavici, cum notis A. DE PAPE. L. B.*, 1694, in 4to.

W. VAN ALPHEN, *Papepgaij, of Formulier-Boek. Utr.*, 1740, 2 Deelen, in 4to.

P. VROMANS, *De Foro compenti*, door H. VAN MIDDELLAND. *Leijd.*, 1722, in 4to.

*Manier van Procedeeren voor den Hove van Holland. 's Hage*, 1729, in 8vo.

S. VAN LEEUWEN, *Manier van Procedeeren in Civile en Crimineele zaaken. Amst.*, 1721, in 8vo.

To these add the *rules and orders of the High Court*; also the *ordinances on the mode of procedure* of the different towns. In Latin there are few authorities of any use on practice, with the exception of the *Observationes Practicæ* by A. GAIL, and perhaps a few others.

Here you have a sketch of a *law library*. Many valuable works might certainly be added, but my object was to form a select library. The possessor of such a library, who knows how to make a proper use of it, will be able to improve and enlarge it by himself as he may deem necessary without requiring my instructions.



MANUAL  
OF  
LAW, PRACTICE, & MERCANTILE LAW.

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BOOK I.  
ON CIVIL JURISPRUDENCE.

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CHAPTER I.  
ON THE LAWS IN GENERAL.

SECTION I.

JURISPRUDENCE is the science which teaches us what Jurisprudence is just or unjust (1).

SECTION II.

That which is *just* or *unjust* is measured by the agreement or disagreement of any act with the law (2).

SECTION III.

Jus (law, or that which is *just*) is usually divided Division of Jus, or law. into—

(a) The *law of nature*, including all the duties, both perfect and imperfect, which natural reason

(1) *Justi atque injusti scientia*, § 1, *Inst. L.* 10, § 2, *ff. de Just. et Jur.*

(2) *L.* 1, § 1, *ff. de Just. et Jur.*, De Groot, *Intro.* 1 *B.*, 1 *D.*, § 3, *et seq.*



teaches us must be observed in order to advance our own happiness and that of our fellow men (1);

(b) *International law*, including the laws which nations observe in regard to each other; *e.g.*, the rights of war, the laws regarding treaties, etc. (2); and, lastly :

(c) *The civil law*, including the commands which the supreme civil authority, clothed with legislative power, has decreed and published (3).

As we do not intend in this work to enter upon the wide subject of all duties, or to treat of the law of nations, we shall simply confine ourselves to the third kind, or the *civil law*.

#### SECTION IV.

What laws  
are to be  
observed in  
our country.

In order to answer the question, What is the law in such and such a case? we must first inquire whether any general *law of the land*, or any local *ordinance* having the force of law, or any well-established *custom*

(1) Besides the works of Grotius, Pufendorf, and others, the principles of the law of nature will be found best discussed by Prof. Pestel, in *Fundam. Jurisprud. Natur.*

(2) Those who desire accurate information upon the nature of the different forms of government, and the duties of nations to themselves and each other, may consult in particular, besides Grotius, Pufendorf and other writers on international law, *Le Droit des Gens, par De Vattel*, in 4to.

(3) § 1, *Inst. de J. N. G. & C.* There is no doubt that the laws must be brought to the notice of the people by promulgation in order to become obligatory. Voet, *Ad tit. ff. de legib.*, Nos. 9 & 10. To what extent the authority of law should be attributed to a Resolution of Government which has not been published, we have considered in our *Aanteek. op Merula's Man. van Proced.* 1 B. 4 *Tit. cap.* 5, § 1, *Vol. I.*, p. 69.

can be found affecting it (1). The Roman law, as a model of wisdom and equity (2), is, in default of such a law, accepted by us through custom in order to supply this want (3). The *States of Holland* express themselves very clearly in a certain *Resolution of the 25th of May, 1735*, in these terms: "That the High Court, as well as all other judges in the province of Holland and West Friesland, must do justice according to the laws and ordinances of the land, according to the privileges and well-established customs and usages, and in default of these, according to the written law"\* (4). The use of the *laws of neighbouring nations* is a means which, although not to be entirely rejected, should be resorted to with the greatest caution, and never but in such cases in which we feel perfectly convinced that the law of the neighbouring country and our own agree in this point in analogy (5).

The *canon law* is sometimes useful; namely, when the case in question was born of that law: examples of which may be found in separations *à mensâ et thoro* and the like (6).

(1) V. D. Keessel, *Thes. Jur. Holl. et Zeel.*, Th. 7.

(2) De Groot, *Introd.*, 1 B., 2 D., § 22, No. 26.

(3) On the time and mode of this adoption compare H. Fagel and J. C. van der Hoop, *Dissert. de usu Juris Romani in Hollandia* (Hag. 1779), and L. P. van der Spiegel, *Oorspr. der Vaderl. Regten*, cap. 2 & 3.

\* By the written law is meant the Roman law.—TR.

(4) Vide *Gr. Pl. Boek* (Large Statute-Book), 7 D., p. 96.

(5) V. D. Keessel, *Thes. Jur. Holl. et Zeel.*, Th. 13.

(6) V. D. Spiegel, *Oorspr. der Vaderl. Regten*, p. 110, et seq. V. D. Keessel, *Thes.* 25.

## SECTION V.

Binding force  
of statutes.

Among the laws which have first to be considered we just now mentioned *local ordinances and customs*. There is no doubt that these bind all such persons as live in that locality, sojourn there for a time, or possess immovable property there.

But are they also of any binding force upon legislators and judges of other places? That is a very nice point of law; and it will be sufficient to observe here that, although according to strict law no *statute* has really any operation out of the jurisdiction, yet the mutual and reciprocal comity of neighbouring states has established, as an almost universal rule, that the transactions of persons who have observed the requisites prescribed by the laws of their domicile, are judged according to those laws, although the particular laws of the country in which the matter has to be decided prescribe other forms. For example, a will made according to the form used in the domicile is valid everywhere; the community of goods established between married people by the common law continues in force, although they afterwards take up a new domicile in a country where no community exists, etc. (1).

## SECTION VI.

Interpretation  
of the laws.

All laws are capable of *interpretation*, which is of a threefold nature, viz.: It is effected by the legislator himself; or by usage, *e.g.*, when a law is interpreted

(1) On the force of statutes, especially when a conflict of laws takes place, compare P. Voet, *Tract. de Statut.*; J. Voet, *ad tit. ff. de const. Princ. part 2, de Statut.*; V. D. Keessel, *Thes.* 27-44.

in such or such a manner by a series of decisions; or by the opinion of lawyers. Although the opinions of the latter have not of themselves the force of law, yet their interpretations may be adopted, and not without reason, if they have observed sound rules of construction, of which the following are the most important:—

1st. The principal rule of all construction is this: that the true sense and meaning of the *words* should be followed, and should not be departed from if the wording is clear (1).

2nd. In the construction of any point of law, this should first be considered: *from what source was that law derived?* For example, in questions on last wills, recourse is immediately had to the *Roman* law which is followed in this branch of the law; but to pursue the same course in a question on community of goods, which is unknown to the *Roman* law and of *German* origin, would be quite absurd (2).

3rd. When the words of the law are doubtful, its intent and object should be considered; all the separate clauses of the law compared with each other (3); one law construed by the aid of another (4); that which the legislator said in a similar case (5); or the custom (6), or the view which equity most strongly

(1) Compare J. H. Boehmer, *De Interpretationis Grammaticae fati et usu vario in Jure Romano*, in *Exerc. ad ff.* Tom. 1, *Exerc.* 3, p. 22, *seq.*, and above all the excellent work of C. H. Eckhard, *Hermeneutica Juris. cum not. C. F. Walchii* (Lips. 1799).

(2) V. D. Keessel, *Thes.* 9 & 10.

(3) *L.* 24, *ff. de legib.*

(4) *L.* 26, *L.* 27, *L.* 28, *ff. de legib.*

(5) *L. ult. C. de legib.*

(6) *L.* 37, *L.* 38, *ff. de legib.*



urges, should be called in aid (1). A consideration also of the consequences which would result from a certain construction is often very useful in such a case (2).

4th. Sometimes the application of a law may be extended to similar cases, on the ground of a perfect and thorough similarity of principle: this is usually termed *extensive interpretation* (3).

5th. In other cases, on the contrary, the interpretation must be *restrictive*, principally when some matter contrary to the general rules of law has been introduced, from some special necessity, to meet a particular case (4); or when it is evident that the reasons which influenced the legislator do not apply to the case in question, though it might otherwise seem to fall under the words of the law (5).

## SECTION VII.

### Customs.

Besides the written there are also some *unwritten* laws. These were what we meant by the term (*supra*, § IV.) *well-established customs*.

These have existed at all ancient times in this country, and have been followed like laws (6). Never-

(1) *L. 18, L. 19, ff. de legib. L. 56, L. 168, L. 192, § 1, ff. de Reg. Jur. L. 47, ff. de obl. et act.*

(2) *L. 22, ff. de legib.*

(3) *L. 10, L. 11, L. 12, L. 13, L. 29, L. 30, ff. de legib. L. 5, C. cod.*

(4) *L. 14, L. 16, L. 39, ff. de legib. C. 141, L. 162, ff. de Reg. Jur.*

(5) *L. 25, ff. de legib. L. 6, C. cod.* Compare on these points Pothier, in *Pand. Justin. ad tit. ff. de legib., art. 4.*

(6) V. D. Spiegel, *Oorspr. der Vaderl. Regten*, 3 Hoofdst. (cap.) §§ 8-13, p. 96 et seq., *Rechtsgel. Observ. over De Groot's Introduction to Jurisprudence*, 2 D. Obs. 1. Provided the old customs have

theless there are some rules on this subject also that have to be observed.

1st. The custom must rest upon sound reason: otherwise it is properly regarded as bad, and, so far from having the authority of law, it should be abolished (1).

2nd. It must be satisfactorily proved: *e.g.*, by a great number of witnesses, by an unbroken chain of decisions founded upon this custom, etc. (2). A custom fulfilling all the requisites mentioned not only supplies the place of law in cases in which the written law is silent (3), but has even the power of annulling a written law (4).

## SECTION VIII.

The usual manner, however, in which a law is annulled is by express *repeal* by the legislature (5). But the less frequently that happens, the better the statesmanship that governs the country. And it is undoubtedly to be accounted one of the calamities of our time, that our national jurisprudence has of late years

Repeal of laws.

been established by long usage, their validity is not affected by the question whether they have been recorded in the Registrar's office by order of the Emperor Charles V. in 1531 and 1540, and of the Court in 1569, or not. *Vide* V. D. Wall, *Handv. van Dordrecht*, 6 stuk, p. 1328 *et seqq.*, & *Supplem. nostrum ad Voet*, part 1, p. 13.

(1) *L.* 39, *ff. de legib.*; Voet, *Ad d. t. n.* 28.

(2) Voet, *ad tit. ff. de legib. n.* 29 *seqq.*

(3) § 9, *Inst. de J. N. G. & C.*, *L.* 32, § 1, *L.* 33, *L.* 35, *ff. de legib.*

(4) *L.* 32, § 1, *in fin. ff. de legib.* On the meaning of *L.* 2. *C. quæ sit long. consuet.*, which is usually objected to here, compare Noodt in *Comm. ad t. ff. de legib.*, and above all J. Averanius *Interpr. Jur.*, *Lib.* 2, *Cap.* 1.

(5) *L. ult. ff. de const. Princ.*; § 11, *Inst. de J. N. G. & C.*

assumed a but too arbitrary character, owing to the great accumulation of laws, which can scarcely be remembered, and some of which contradict each other. However the hope now continually grows stronger, that in this respect also we are about to return to our former simplicity and certainty.

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## CHAPTER II.

### ON THE RIGHTS OF MEN ACCORDING TO THEIR DIFFERENT SOCIAL CONDITION.

#### SECTION I.

Objects of  
the law.

As the objects to which all laws can be made to refer consist of these three: 1st, *persons*; 2nd, *things*; 3rd, *actions* (1); we shall also adopt this principal division as the basis of this work; and consequently we shall *first* treat of the rights which each man or person possesses, according to his particular social condition; *secondly*, of the rights *in* or *to* anything: and in discussing each of these rights we shall mention, wherever it is fitting, the *action* or legal remedy granted by law on account of such right, while the mode of instituting and prosecuting such actions will be treated of in the *third Book*.

(1) § ult. *Inst. de J. N. G. & C.*

## SECTION II.

The various social conditions of men, in so far as they have any influence upon their rights, may be classed under three principal heads:—

Various social conditions of men.

I. The condition of freedom and slavery;

II. The condition of citizenship;

III. Family relations.

## SECTION III.

The difference between *freemen* and *slaves* which embraced such a wide field of Roman jurisprudence, has no application in our country; all persons are born free in this country: slavery is not in use in this country; nay, even all slaves that come here from the *Indies*, immediately become free (1), provided they did not run away from their masters (2).

Freedom and slavery.

## SECTION IV.

With respect to the condition of *citizenship*, its influence on the various rights of men was very great in former times in this country. *Aliens* were excluded from many of the rights of *natural-born subjects*. This difference was marked in the cases of inheritance, giving evidence, punishment of crimes, and admission to offices and posts (3). Whenever the property of aliens passed to relatives living out of this country, a

Condition of citizenship.

(1) *Cost. v. Antwerpen*, Cap. 36, Art. 1 & 2. *Roseboom*, *Cost. v. Amsterdam*, Cap. 39, Art. 1 & 2. *Gudelinus*, *De Jure noviss.*, Lib. 1, Cap. 4, p. 6.

(2) *Regtsgel. Observ. over De Groot*, 4 D., obs. 16.

(3) *De Groot*, *Intro.*, 1 B. 13 D. § 2; *Regtsgel. Observ.* 2 D. obs. 17 & 18, & 3 D. Obs. 21.



heavy duty was imposed upon it, known by the name of *right of exue* (1). Very great also was formerly the difference between the *nobility* and *commoners*, marks of which were seen in the admission to posts and offices, the punishment of offences, the payment of scot and lot, and in following the chase (2).

*Religion* itself could not but produce various effects upon the social conditions of men. Besides the old distinction between *clergy* and the *laity* (3), those who belonged to any other Christian sect than the *Reformed Church* were excluded from many privileges. None but members of the *Reformed Church* were qualified for posts and offices (4); marriages between members of the *Reformed Church* and *Roman Catholics* entailed very prejudicial consequences (5). The situation of the *Jews* was still worse, as they were not allowed to exercise any trade or calling, which belonged to certain guilds (6).

But gradually, as the relations of this country with foreign nations expanded, and the ideas of men became more civilised and moderate, these distinctions were done away with; *aliens* who settled here were allowed almost the same rights as other inhabitants (7). The *right of exue* was first cut down by several treaties,

(1) H. J. Arntzenius, *Instit. Jur. Belg. Civ.*, part 1, tit. 12, § 8, *seqq.*

(2) A. Matthæus, *De Nobilitate*, De Groot, *Intro.*, 1 B. 14 D., S. van Leeuwen, *Van de Edelen en Welgeborenen in Holland*.

(3) De Groot, *Intro.*, 1 B. 14 Deel.

(4) Zurck, *Cod. Bat. voce Papisten*, § 21.

(5) *Placaat van de Staten van Holland*, January 24, 1755, repealed by *Decree of 6th March*, 1795.

(6) Zurck, *Cod. Bat. voce Joden*.

(7) De Groot, *Intro.*, 1 B. 13 D. § 3.

and then entirely abolished (1). The so-called rights of the nobility, for a great part relics of the middle ages, were hardly any longer respected (2); the sectarian zeal of the Christian persuasions no longer finds supporters; and the Jews, who pay the same taxes as we do, enjoy the same civil privileges (3).

Nevertheless it is a fact, that the idea of the *equality of men*, although it in itself contains much that is true and beautiful (4), has been applied by many persons with so much exaggeration, and so many false conclusions, that, in their desire to sweep away entirely all difference in the social conditions of men, they have caused the very foundations of order and policy to commence to totter more or less. From this exaggerated and false application we have already to a great extent drawn back; so that at the present day the *condition of citizenship* secures, according to the various regulations of various towns and places, the enjoyment of privileges from which all persons who are not citizens of such place, are excluded. The special proofs, among others, of this retrogression are, the check put upon the unlimited abolition of guilds, which caused so many disorders and irregularities in, and the destruction of, trades and handicrafts; and the re-establishment of such regulations as are necessary in order to secure for every citizen an honourable means of livelihood (5).

(1) Arntzenius, *loc. supra cit.*, *Publ.* 6 April, 1797.

(2) De Groot, *Intro.*, 1 B. 14 D. § 6.

(3) *Staatsregeling van Oct. 1801, Art. 11-14.*

(4) *Vide the Treatises of H. C. Cras and L. W. Brown on the Equality of Men, together with its Rights and Duties; in the Treatise upon Teyler's Godgel. Genoodschap, part 13.*

(5) *Staatsregeling, Oct. 1801, Art. 4.*

## SECTION V.

Family  
relations.

The *family relations*, however, constitute the most important social condition, which create among men in our country very different rights.

The rights of *married* people differ from those of *unmarried* people. The unusually great influence of this difference induces me to treat specially of the *rights of marriage* in the *third chapter*.

The rights of *parents* and of *children*, who are subject to parental authority, differ. We shall discuss the *paternal power* in the fourth chapter.

Lastly, the rights of those who, on account of youth, weakness of mind, extravagance, and similar causes, are unfit to be entrusted with the care of their own persons and property, differ from the rights of those to whom such care is committed. We shall therefore select Chapter V. for treating on *guardians and curators*.

## CHAPTER III.

## MARRIAGE, AND THE LAWS RELATING THERETO.

## SECTION I.

Marriage.

The condition of those persons who are bound in marriage differs very much from that of unmarried people. By *marriage* is understood, "the union of man and woman contracted for the purpose of procreating and rearing children, and of sharing all good and bad fortune with one another, in an indivisible union and until death" (1).

(1) § 1. *Inst. de patr. potest.*, L. 1, ff. *de rit. nupt.* Pestel, *Fund. Jurispr. natur.* § 127. When we consider and examine the nature,

## SECTION II.

Marriage is frequently preceded by espousals Espousals. (*Trouwbeloften*), which consist in the obligation of contracting a legal marriage with the other person.

The parties who enter into these espousals must be competent to marry each other (1). When the man is under twenty-five or the woman under twenty, the consent of parents, guardians or relatives is necessary to the espousals; without it they are *clandestine* and invalid (2).

Espousals may be contracted *purely*—*i.e.* without any condition—or conditionally, provided the condition be not immoral or impossible; also on condition of the marriage taking place immediately or after a lapse of time (3).

The consent to espousals must be proved by satisfactory evidence; it is never presumed; and without proof not even a tender of his oath by the plaintiff would be admitted in this case (4).

Espousals give rise to an action for the performance of the marriage, to which the unwilling party, after judgment has been given against him by the court, may be compelled by civil imprisonment (5).

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the object, and the consequences of marriage, even without the slightest bigoted notions, we cannot help wondering how any one could fall into the error of classing it among *civil contracts*.

(1) Voet, *ad tit. ff. de sponsal*, n. 2.

(2) *Plac. van Keizer Karel of 4 Oct.*, 1540, *Art. 17*; *Polit. Ord.* of 1580, *Art. 3*.

(3) Voet, *ad tit. ff. de sponsal*, n. 6-10.

(4) De Groot, *Intro.*, 1 B. 5 D. § 16, n. 23. Voet, *ad tit. ff. de sponsal*, n. 11. Lybregts, *Red. Vert. over 't Not. ambt*, 1 D., 6 Chap., n. 10-16.

(5) Voet, *ad tit. ff. de sponsal*, n. 12.



## 14 *Manual of Law, Practice, and Mercantile Law.*

Like all other contracts and agreements, espousals may be rescinded by mutual consent (1); but not by one party against the will of the other—not even on the ground that the marriage would displease one's parents, and that one preferred to comply with their wishes (2). However, when there are lawful reasons for *repudiation*, either party may rescind the contract. Such reasons are, *e.g.*, sudden and continuous insanity, unchaste behaviour towards others, excessive licentiousness, a defect which prevents procreation, clear fraud by the concealment of considerable debts, and the like (3): but these reasons, which now and then spring merely from fickleness, should not be admitted too readily (4).

### SECTION III.

Antenuptial  
contracts.

Very often it is not deemed advisable to contract a marriage according to the common law, but to define the terms and conditions according to which the marriage is to be regulated by a special agreement, which is termed an *antenuptial contract* (5).

In order to be valid, it must be in *writing*, and contained in a *public instrument* (6); although no *legal registration* is required, since the law on this point as

(1) Voet, *ad tit. ff. de sponsal*, n. 18.

(2) Boel *ad Loenii, Decis. Cas.* 55. However, upon the authority of *L. 20, C. de nupt.*, it is understood that a girl, above 20 but under 25, having contracted espousals without the consent of her parents, can rescind them, even without *restitutio*. V. D. Keessel, *Thes.* 55.

(3) H. J. Arntzenii, *Inst. Jur. Belg. Civ.*, part 2, *tit.* 1, §§ 39–45.

(4) Voet, *ad tit. ff. de sponsal*, n. 15.

(5) V. D. Keessel, *Thes.* 228.

(6) *Regtsgel. Observ.*, 2 D. *obs.* 35.

enacted by the Placaat of 30th July, 1624, has never been acted upon (1).

An *inventory* or *schedule of the property* to be contributed by the bride is sometimes inserted in antenuptial contracts; sometimes the schedule is made separately and privately (*i.e.*, not notarial) and annexed to the contract (2). The omission to make this inventory does not vitiate the contract itself, but proof aliunde must be given of such property (3).

#### SECTION IV.

Any condition one pleases may be inserted in an antenuptial contract, provided it be not contrary to the principle of marriage (4). What conditions to insert.

The most usual conditions are:—

1. That the future husband and wife shall contribute their property to the support of the marriage, without any community of goods thereby taking place (5).

2. That neither shall be liable for the debts of the other, contracted before or after marriage.

3. That the profit and loss shall be common, *or* that the community of profit and loss shall be excluded, *or* that the woman or her heirs shall, after the dissolution of the marriage, elect whether to share in the profit and loss or not (6).

(1) *Regtsgel. Observ.*, 1 D. obs. 42; *Handv. van Amsterdam*, 2 D. p. 551.

(2) *Ord van 't Zegel van 11 Sept.*, 1794, Art. 49.

(3) V. D. Keessel, *Thes.* 230.

(4) Voet, *ad tit. ff. de pact. dot. n.* 14 *seqq.*

(5) H. J. Arntzenii, *Inst. Jur. Belg. Civ.*, Part 2, tit. 5, §§ 43 & 44.

(6) V. D. Keessel, *Thes. Jur. Holl. et Zeel. Th.* 249, *seqq.*

4. That the wife on dissolution of the marriage shall reserve to herself her right of dower, tacit mortgage and preference (1).

5. That the wife shall have the control of her own property, without being subject in that respect to her husband's marital power (2).

6. That the survivor shall receive, by way of gift or donation, a certain sum out of the estate of the deceased. This donation is called *douarie*.

As it has no other origin than mere liberality, it follows that it cannot be taken into account or paid until all the creditors have been paid (3), nor (at least according to the most likely opinions) until the children have received their legitimate portion (4).

7. The mode of succession, after the decease of one or both of the parties, to his or their estate (5).

8. The mode of succession to the property of the children, should they die without having attained the age at which it is competent to make a will (6).

(1) Although this privilege may not expressly be agreed upon, yet it should be granted to the wife whenever she has not entered into community of goods. V. D. Keessel, *Th.* 247.

(2) De Groot, *Intro.*, 1 B. 5 D. § 24, n. 39.

(3) *Placaat of the Emperor Charles*, 4 Oct., 1540, Art. 6.

(4) The president, Van Bynkershoek, differs from us on this point. *Quest. Jur. Priv. Lib.* 2, Cap. 7. But the arguments he has adduced may be found refuted in the *Regtsgel. Obs. over De Groot*, 3 D. Obs. 38, and in the *Supplem. agter 't 4 part*, p. 259.

(5) V. D. Keessel, *Thes.* §§ 235-246.

(6) This agreement is known by the name of "Election of Common Law." De Groot, *Intro.* 2 B. D. 29; Lybregts, *Reden. Vert.* 2 D. *Bijl. Litt.*; S. J. Cos, *Regtsgel. Verhand.* 5.

## SECTION V.

Whatever the future husband and wife have mutually promised each other by antenuptial contract cannot be revoked by mutual consent, by any deed, *inter vivos* (1), otherwise it would have the effect of a gift between husband and wife, which is not allowed by law (2). But such revocation is valid if made by will, provided they both abide by this revocation, and thus confirm it by death (3).

To what extent they are irrevocable.

Whether, moreover, the conditions inserted in the antenuptial contract with respect to the future succession are also irrevocable to such an extent that one of the spouses cannot alter them without the consent of the other, is a question upon which jurists are not agreed. For our part we are most disposed to hold that such conditions have simply the force of a last will, and may therefore be revoked by both, or even one of the spouses (4).

## SECTION VI.

The principal requisites of a legal marriage may be reduced chiefly to the following:—

Requisites of marriage.

(1) V. D. Keessel, *Th.* 264.

(2) De Groot, *Intro.* 3 B. 2 D. § 9; Voet, *Ad tit. ff. de don. int. vir. et ux. n.* 17, *seqq.*

(3) Voet, *ad tit. ff. de pact. dotal. n.* 62.

(4) Although several jurists maintain the irrevocability of *pacta successoria*, we cannot agree with this view, but are of opinion that the analogy of our law in this respect is very accurately expressed in the *Costumen van Rhyndland*, Art. 92. "In antenuptial contracts dispositions may be made, by last will, which have the force of a testament, as all last wills have." Vide also our notes on Pothier's *Contracts and Obligations*, 1 D. pp. 142-145.



Prohibited  
marriages.

I. That the persons who wish to contract marriage must *either* have a general capacity of marriage, or be capable of marrying each other.

Persons who are not capable of marrying *at all* are : those who are already joined in the bonds of marriage, because polygamy is not allowed among us (1); those who have not attained the marriageable age, which for males is fourteen and for females twelve years (2); a widow whose husband has not been dead so long that one can be perfectly sure whether such widow is pregnant or not (3); those who suffer from such mental incapacity as not to be capable of giving their consent (4), or from such an incurable physical infirmity as to render them unable to procreate children (5).

The following persons may not marry *each other* :—

*a.* Those who are too closely related by blood or affinity. Marriage is prohibited in the ascending and descending lines, *in infinitum*; in the collateral line between persons within the second and third degrees, consequently between brothers and sisters, uncles and nieces, aunts and nephews; in relationship by marriage the prohibition extends equally far, and in the same manner (6). Although examples are to be found during the government of the former states of marriages allowed by dispensation between persons who by law

(1) V. D. Keessel, *Thes.* 62 & 63.

(2) De Groot, *Intro.* 1 B. 5 D. § 3.

(3) Ibid. n. 7; Bynkershoek, *Quæst. Jur. Priv. Lib.* 2, Cap. 1.

(4) Voet, *ad tit. ff. de rit. nupt.* n. 6.

(5) De Groot, *Intro.* 1 B. 5 D. § 4; Lybrechts, *Reden. Vert. over 't Not. Ambt.* 1 D. 12 Cap. § 16; p. 176.

(6) Ibid. §§ 5–13; *Regtsgel. Observ.* 4 D. obs. 3.

were prohibited from marrying (1), still such cases were rare, and the rule of law was not lightly departed from. But after the year 1795 the dispensations became more numerous, even among persons within degrees which would formerly not have been thought of. We prefer leaving others to judge whether it were not better to have a precise law of the country on this point, and to follow it strictly, than to wander about in ever-changing uncertainty and irregularity.

*b.* Those who have previously lived in adultery with each other. Such marriages are not only void, but are also criminal (2); nor are they allowed by dispensation (3).

*c.* There was a strong prohibition in Holland against marriages between persons who had eloped (4), which was afterwards considerably relaxed whenever the subsequent consent of parents was obtained (5).

*d.* On account of the difference in religion, the marriages of Christians with Jews or Mohammedans are considered as prohibited (6). Marriages between persons of the Reformed Church and Roman Catholics were formerly subject to severe penalties; but this law is now repealed (7).

*e.* No guardian or curator may marry the per-

(1) These examples may be found collected in the *Regtsgel. Obs. d. l.*

(2) *Plac. Holl.* 18 July, 1674; *Bynkershoek, Quæst. Jur. Priv. Lib. 2 Cap. 10; Regtsgel. Observ. 1 D. obs. 11.*

(3) Vide examples of this in the *Gr. Plac. Roek*, 7 D. p. 812, & 9 D. pp. 372 & 384.

(4) *Plac. Holl.* 25 Feb. 1751, in the *G. P. B.* 8 D. 535.

(5) *Resol. Holl.* 26 June, 1783, in the *G. P. B.* 9 D. p. 375.

(6) *Arntzenii, Inst. Jur. Belg. Civ. part 2, Tit. 3, § 55.*

(7) *Plac. Holl.* 24 Jan. 1775; the *Decreet* of 6 March, 1795.

son over whom he exercised the guardianship or curatorship until his accounts have been audited and closed (1).

Consent of  
parents.

II. That if the parents of the parties who wish to marry each other are alive, their assent or consent must be previously obtained, and with regard to this, the following points should be observed: 1st, A distinction must be drawn between minors and majors. In the case of minors, *i.e.*, males under twenty-five, and girls under twenty years, the publication of the banns is not granted unless they can prove the consent of their parents (2). 2nd, By *parents* in this case are only meant father and mother, and never grandfather or grandmother; much less any more remote relation in the ascending or collateral line (3). 3rd, When such persons are above the ages mentioned the publication of banns is granted, and their parents are summoned before the magistrate, or college, specially appointed for matrimonial causes, to show cause for granting or withholding their consent (4). If they do not appear to this summons within fourteen days their silence is held for consent (5). The court has to decide what grounds are sufficient for enabling parents to prevent the marriage of their major children; these are generally founded on some publicly disgraceful conduct (6). Whenever the reasons adduced by the parents have been approved of by the

(1) V. D. Keessel, *Thes.* 74.

(2) *Polit. Ordonn.* 1580, Art. 3.

(3) *Plac. Holl.* 31 July, 1671.

(4) *Pol. Ord. d. Art.* 3.

(5) *Ibid.*

(6) Arntzenii, *Inst. Jur. Belg. Civ. Part 2, Tit. 3, § 21.*



court (by which is to be understood the full college or inferior court, or at least *two-thirds* thereof), the matter is at an end, and no appeal lies from this decision. The parents, on the other hand, have a right of appeal (1). We are of opinion that the consent of guardians is unnecessary at common law, unless the local laws contain some special enactment on the subject (2).

III. The ceremonies to be observed at a marriage in order to render it valid are the following:—

Marriage  
ceremonies.

1st. The parties must appear before the magistrate or commissioners of matrimonial causes, and have their intended marriage registered, and apply for the publication of the banns on three Sundays (3).

2nd. The payment of the *duty* on marriages must be seen to, which payment is calculated at *thirty, fifteen, six, or three* guilders, according to the occupation or property of the bride and bridegroom, or of the parents of one of them (4).

3rd. The publication of the *banns* or *proclamations*, which have been applied for, must take place without any impediment. They are *three* in number (5); they are published at the Town House or at the Church, in the domiciles of the bride and bridegroom, or in the place where they lived last, within a year and a day (6).

(1) *Edict Holl.* 27 Sept. 1663; uit *G. P. B.* 3 D. p. 505; Bynkershoek, *Quæst. Jur. Priv. Lib.* 2, Cap. 5; Zurck, *Cod. Bat. voce Appel.* § 59.

(2) De Groot, *Intro.* 1 B. 8 D. § 3; Bynkershoek, *Quæst. Jur. Priv. Lib.* 2, Cap. 3; V. D. Keessel, *Th.* 125, 126.

(3) *Pol. Ordonn. Art.* 3.

(4) *Ordonn. Rules for Marriages and Funerals*, 26 Oct. 1695. *Publ.* 3 Dec. 1695.

(5) *Pol. Ordonn. Art.* 3.

(6) Arntzenii, *Inst. Jur. Belg. Civ. Part* 2, *Tit.* 3, § 59.



Unless for some urgent reasons of necessity two or three banns are allowed to be published on one day, an interval of eight days takes place between each publication (1). When any one believes that, on account of previous espousals or other grounds, he has reasons for opposing the marriage, he must appear before those authorities or that court to whom the enquiry into such matters has been committed, and there lodge a *protest* against the banns (2), in which case the further proceedings are conducted in the usual manner, and no appeal lies (3).

4th. Finally, after the publication of the banns has taken place without impediment the marriage is *celebrated* or *consecrated*. Formerly this was done, in the case of members of the Reformed Church, by a minister in the church, and, when the parties were of a different religion, by the magistrate in the Town House (4). Now the marriage is celebrated by the magistrate in all cases (5), although very many people, abiding by the old custom, have the marriage subsequently confirmed in church; but this is optional, and not necessary.

A marriage in which the above-mentioned requisites are not observed is *null and void* (6).

(1) Loenius, *Decis. et Observ. Cas.* 79; *ibique* Boel, *in not.* pp. 513-528.

(2) Arntzenii, *Inst. Jur. Belg. Civ. d. l.* § 61.

(3) V. D. Keessel, *Thes.* 81.

(4) *Pol. Ord. Art.* 3; Arntzenius, *d. l.* § 64, *seqq.*

(5) *Public. Holl.* 7 May, 1795.

(6) *Pol. Ordonn. Art.* 13.

# SECTION VII.

The *consequences* of a legally contracted marriage, <sup>Consequences of marriage.</sup> so far as they are not modified by a special antenuptial contract, relate either to the persons *or* to the property of the spouses.

The *personal consequences* of the marriage (because there is no need here to speak of the duty of displaying mutual love, or of providing for the proper support of the household) consist principally in the *marital power* of the husband over the wife.

The wife becomes a minor by the marriage (1). The <sup>Marital power.</sup> husband occupies the position of curator to her; she has no *locus standi* in court\* (2); she is not competent to bind herself to others by any contract (3) entered into by her without the knowledge or consent of her husband, except in so far as she may clearly appear to have been benefited thereby (4), or in case she was accustomed to carry on business to the knowledge of her husband as a public trader (5). But, on the other hand, a consequence of this power of the husband over the wife is, that she is also bound and liable for all the transactions entered into by her husband even without her knowledge, equally with him while the marriage subsists, and to the extent of one-half thereof after his death (6); unless her

(1) De Groot, *Intro.* 1 B. 5 D. § 19.

\* *I.e.*, she cannot appear by herself in court.—TR.

(2) Voet, *ad tit. ff. de judic. n.* 14, 19.

(3) Voet, *ad tit. ff. de rit. nupt. n.* 42.

(4) De Groot, *Intro.* 1 B. 5 D. § 23, n. 38.

(5) *Ibid.* d. § 23; Voet, *ad tit. ff. de rit. nupt. n.* 44, *seqq.*

(6) *Ibid.* d. l. § 22; S. van Leeuwen, *Cens. For. Part 2, Lib. 1, Cap. 11, n.* 6 & 7.

husband's obligation arose out of a crime committed by him (1). And, lastly, the husband may alienate and encumber the wife's property, as he pleases without requiring her consent for that purpose (2). However, if he clearly abuses his marital power, and is likely to reduce his wife to poverty, the law affords the wife the means of restraining him within bounds (3).

The most usual remedy now in such a case is a petition praying that the husband's person and property may be placed under curatorship.

## SECTION VIII.

Community of  
goods.

If no provision has been made by antenuptial contract with respect to the property of husband and wife, then by the common law (4) the goods of both parties become common as soon as the marriage is completed (5), so that the rule, "*that man and wife have no separate property*," holds with us (6). Indeed, it applies to such an extent that when community of goods is once established by a marriage being contracted, it can never afterwards be severed or changed in any way (7). Nor does it make any difference whether

(1) Loenius, *Decis. et Observ. Cas.* 103, p. 669, *seqq.*

(2) De Groot, *Intro.* 1. B. 5. D. § 22; Voet, *ad tit. ff. de fund. n.* 7 & 8.

(3) *Ibid.* d. l. § 24; *Sent. van dan Hoog. & Prov. Raad*, n. 135; S. van Leeuwen, *Cens. For.* p. 1, L. 1, C. 12, n. 7; *ibique* DeHaas *in not*; Voet, *ad tit. ff. de fund. dot. n.* 7, & *sol. matr. n.* 2.

(4) The various opinions on the origin of this law are stated by Arntzenius, *Inst. Jur. Belg. Civ. Part 2, Tit. 4, § 4.*

(5) De Groot, *Intro.* 2 B. 11 D. § 8; *Regtsg. Obs.* 2 D. Obs. 32.

(6) A Matthæi *Paroem.* 2.

(7) Arntzenii, *Inst. Jur. Belg. Civ. Part 2, Tit. 4, § 10.*

it is a first or a second marriage (1). And there are only two cases in which marriage does not produce any community: 1st, in clandestine marriages of minors (2) and, 2nd, in marriages between persons who have eloped (3).

This community extends to everything which the spouses on either side possess at the time the marriage is contracted, or which they acquire during its subsistence, whether by way of inheritance, legacy, gift, or by any other title; also everything comprehended under the name of profit (*winst*) (4). And no other property is excluded from it than that which must go over to third persons after death or expiration of a certain time, and thus by its very nature is incapable of being brought into community. Of this nature are feuds, both direct and hereditary (5); also heirlooms (*family property*) which go to the eldest of the family on the death of the possessor (6); property subject to a *fidei-commissum* (7), and the like.

Just as community takes place with respect to all

(1) *Decis. and Resol. v. d. Hove. v. Holl. n.* 155 & 422; Voet, *Ad tit. ff. de rit. nupt. n.* 89 & 123. That community of goods also takes place in second marriages is disputable in our law; but is it fair when there are children by the former marriage? Should not some provisions be made upon this subject? This is another question upon which we attribute considerable force to the remarks of Bynkershoek, *Quæst. Jur. Priv. Lib. 2, Cap. 2*, and Van Barel, *Over eenige aloude gebruiken in de Rechtsoeffening, Chap. 1*.

(2) *Placaat of the Emperor Charles, 4 Oct. 1540, Art. 17, Pol. Ord. Art. 13*.

(3) *Plac. Holl. 25 Feb. 1751*.

(4) Voet, *ad tit. ff. de rit. nupt. n.* 68-70.

(5) V. D. Keessel, *Thes.* 220.

(6) Arntzenii, *Inst. Jur. Belg. Civ. Part 2, Tit. 4, § 18, n. 3*.

(7) De Groot, *Intro. 2 B. 11 D. n. 8*.



these profits, so it also takes place with respect to all the losses and charges affecting the estate on either side, among which are included the debts, not only contracted during the marriage (1), but also those for which the spouses were liable before marriage (2).

The consequences of the community of goods consist principally of the following five :

1st. The property of both spouses, both that possessed at the time of the marriage and that acquired afterwards, becomes common during the marriage.

2nd. During the marriage it is under the control of the husband.

3rd. All debts contracted before marriage are also common, and must be paid out of the common estate.

4th. On the death of either party the community of goods ceases *ipso jure* ; and

5th. The common property of husband and wife must be divided into two parts, the one half paid over to the surviving spouse, and the other half to the heirs of the first-dying (3).

#### SECTION IX.

Dissolution of  
marriage.

Marriage is dissolved by *death* and by *divorce* (4). The latter is allowed among us on two grounds: 1st, on account of *adultery* (5), and, 2nd, on account of *malicious desertion* (6). Reasons of any other nature, however weighty they may appear, are not valid in

(1) Arntzenius, *d. l.* § 26.

(2) *Rechtsg. Obs.* 3 *D. Obs.* 37.

(3) De Groot, *Intro.* 2 *B.* 11 *D.* § 13.

(4) *Ibid.* 1 *B.* 5 *D.* § 18.

(5) *Pol. Ord. Art.* 18.

(6) Voet, *ad tit. ff. de divort. n.* 9.

this country; nevertheless similar reasons, which by an extensive interpretation can be included under the two aforementioned, must not be excluded. Thus a divorce may be claimed on account of the commission of sodomy (1), on account of perpetual imprisonment, etc. (2).

Besides divorce, which entirely dissolves the marriage, we have also a provisional separation, which has been adopted by us from the canon law (3), known by the name of *separation of board, bed, cohabitation and property*. This cannot be effected by mere mutual consent any more than divorce: it requires legal reasons which make cohabitation dangerous, or at least intolerable (4); therefore, in order to effect a separation, the intervention of judicial authority is necessary, which, after a summary inquiry, must confirm the agreement of the parties in this respect (5). With respect to the consequences of a separation, if at the same time it

Separation à  
mensâ et thoro.

(1) H. Noordkerk, *Dissert. de matrimoniis ob turpe facinus jure solvendis*.

(2) Vide my *Collection of Decisions*, 1 D. Cons. 32.

(3) J. H. Boehmer, in *Jur. Eccles. Protest. Lib. 4, Tit. 19, n. 49, seqq.*

(4) Bynkershoek, *Quæst. Jur. Priv. Lib. 2, Cap. 9*; Leyes, *Medit. ad ff. Tom. 5, Spec. 316*.

(5) As scrupulous and often unnecessarily reluctant as men are in granting divorces, so negligently and rashly are they generally in confirming separations, without sufficient inquiry having been made as to what secret forbidden motives have actuated either the one or the other party in procuring the separation, and what fearful consequences it sometimes produces for one or both of them. We recommend all judges to make a strict inquiry in this matter, which will exonerate them from all responsibility, and we gladly quote the remark of President Van Bynkershoek, *d. l.*: "I sincerely wish that separations were not so numerous, owing to the too great compliance of the judges, as they are at present."

includes a division of property, and is publicly made known, the community of goods established by the marriage is dissolved, and the marital power of the husband ceases (1), always until such time as a reconciliation between the spouses (in the hope of which all separations are concluded) should revive the former rights and consequences of the marriage.

## SECTION X.

Second  
marriage

When the marriage is dissolved by the death of one of the spouses, the survivor may contract a *second marriage*: if the marriage has been dissolved on account of adultery or malicious desertion, the innocent party may also do so. May the guilty person also marry while the innocent party remains single? There is no law which forbids such marriage (2) except with the person with whom the guilty party lived in adultery (3). According to the Roman law, second marriages entailed various penalties which have not been adopted by us (4), with the exception of this prohibition, that no man or woman who marries a second time, having children by a former marriage, may settle by gift *inter vivos*, or by will, on the second spouse more than the amount of the smallest portion which has been bequeathed to any of the children of the former marriage; and everything that is settled beyond this amount is taken from such second spouse, and goes to the children by the first marriage. This law

(1) Bynkershoek, *d. l.*

(2) *Ibid. Quæst. Jur. Priv. Lib. 2, Cap. 10.*

(3) *Plac. Holl. 18 July, 1674.*

(4) Bynkershoek, *Quæst. Jur. Priv. Lib. 2, Cap. 4.*

is known by the name of *lex hac edictali* (1), and such hereditary portion is therefore called a *filiale portie*, or *child's share*.

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## CHAPTER IV.

### ON THE PATERNAL POWER.

#### SECTION I.

THE difference between those persons who are their own masters, and those who are subject to the authority of parents, guardians, or curators, exercises an important influence upon the social conditions of mankind. The *power of parents over their children* differs very much among us from the extensive paternal power among the Romans (2). It belongs not only to the father, but also to the mother, and after the death of the father to the mother alone (3). It consists in a general supervision of the maintenance and education of their children and in the administration of their property. It gives the parents the right of demanding from their children due reverence and obedience to their orders, and also, in case of improper behaviour, to inflict such moderate chastisement as may tend to improvement (4). Parents may not be sued by their children without leave of the

Paternal  
power.

(1) *L. 6 C. de sec. nupt.*; De Groot, *Intro. 2 B. 12 D. § 6, & 16 D. § 7*; Voet, *ad tit. ff. de rit. nupt.* 110, *et seqq.*

(2) De Groot, *Intro. 1 B. 6 D. § 3, n. 5.*

(3) Voet, *ad tit. ff. de his, qui sunt sui vel al. jur. n. 3.*

(4) Voet, *d. l. Arntzenii, Inst. Jur. Belg. Civ. Part 1, Tit. 13, § 5 & 6.*



court, termed *venia agendi* (1). No marriage can be contracted by children without the consent of their parents (2). The parents are entitled, on their decease, to provide for the guardianship of their children (3).

As long as the children are minors they cannot bind themselves to third persons without the consent of their parents (4). However, as soon as they are fourteen or twelve years old they can dispose of their property by will (5).

## SECTION II.

How acquired. This paternal power is acquired :

1st. By a lawful *marriage*. Children begotten out of wedlock are not subject to the authority of the father, but of the mother, as she begets no bastard (6).

2nd. By the *legitimation* of illegitimate children, which is effected, either by a subsequent marriage or by special grant from the sovereign authority (7). The latter is chiefly the case when legitimation by subsequent marriage can no longer take place, owing to the death of one or both of the parents (8); provided, however, that the children are not *overwonnen* bastards, *i.e.* born in incest or adultery, in whose case

(1) *L. 4. § 1, et seqq.*; *ff. de in jus. voc.*; Voet, *ad eund. tit. n. 6, et seqq.*

(2) *Pol. Ordonn. 1580, Art 3.*

(3) Voet, *ad tit. ff. de test. tut. n. 1.*

(4) De Groot, *Intro. 1 B. 6 D. § 1, n. 2.*

(5) *Ibid. d. l. § 5, n. 6.*

(6) A Matthæi, *Paroem. 1.*

(7) De Groot, *Intro. 1 B. 12 D. n. 9*; Voet, *ad tit. ff. de concub. n. 4, et seqq.*

(8) V. Alphen, *Papeg. 2 D. 45 Chap.*; Loenius, *Decis. et Observ. Cas. 58*; Zurek, *in Cod. Bat. voce Legitimatie, § 2, n. 4 & 8.*

legitimation is very seldom granted, and only for very cogent reasons (1).

The acquisition of paternal power by means of *adoption of children* is not in use among us (2). Whether, however, this usage would not be just and tend to the advantage of many poor orphans, is not an unsuitable matter for inquiry.

### SECTION III.

The paternal power ceases and is dissolved :

How it ceases.

1st. By the *death* of the parents (3); in which case, should the children still be minors, the paternal supervision is changed into that of guardians.

2nd. By a lawful *marriage* contracted by the children, by which the son becomes of age and the daughter passes from the paternal into the marital power (4). Nay, this is carried to such an extent that a minor daughter who has passed out of the paternal power by marriage does not again become subject to the paternal power, should the marriage be dissolved by death while she is yet a minor (5).

3rd. By *majority*, whether this takes place by attaining the age of twenty-five years (6), or whether it is

(1) Vide my *Verhand. over de Judic. Prac.* 4 B. Chap. 7, § 4, n. 2.

(2) De Groot, *Int.* 1 B. 6 D. § 3 *in fine*; Stockmans, *Decis. Brabant.* 69; Zurek, *in Cod. Bat. voce Adoptie.*

(3) Voet, *ad tit. ff. de adopt. n.* 9.

(4) De Groot, *Introd.* 1 B. 6 D. § 4; Groenewegen, *De Leg. abrog. ad § ult.*; *Inst. de patr. potest.*; Heemskerk, *Bat. Arc.* p. 147.

(5) *Ibid. d. l.*; P. Voet, *ad tit. Inst. quib. mod. jus. patr. pot. solv. § ult. in fine*; Zurek, *in Cod. Bat. voce Houwelyk*, § 7.

(6) Groenewegen, *De Leg. abr. ad pr. Inst. quib. mod. jus. patr. pot. sol.*; S. van Leeuwen, *R. H. R.* 1 B. 13 D. § 6.

obtained by favour of the sovereign power, which is usually called *venia ætatis*. This is now granted by the Departmental Administrative Chamber (1) upon production of letters of *Voorschrijving* \* from the magistrate of the domicile, who usually first hears the parents in their interest, and only grants these letters to males of the age of twenty, and females of the age of eighteen years (2).

4th. By tacit (3) *emancipation*, when the children, with the previous knowledge of their parents, live apart from them and openly exercise some trade or calling (4).

## CHAPTER V.

### ON GUARDIANS AND CURATORS.

#### SECTION I.

Who may be  
guardians.

THE condition of those persons who are their own masters also differs very much from that of persons who, on account of their youth or of some mental or physical infirmity, are subject to the control of others. This control is called *guardianship* or *curatorship*.

(1) *Staatsregeling*, 17 Oct. 1801, Art. 71.

\* Or letters *van zyn goed Komportement*—of his good conduct or behaviour (*Schorer*, vol. 1, p. 78).—Tr.

(2) Vide my *Verhand. over de Judic. Prac.* 2 D. 4 B. Chap. 7, § 5.

(3) Express emancipation, although not without examples in this country, *Regtsg. Observ.* 2 D. Obs. 7, and 4 D. pp. 231–234, is, however, not in use since the expedient of *venia ætatis* has rendered it unnecessary.

(4) De Groot, *Intro.* 1 B. 6 D. § 4, n. 11; Voet, *ad tit. ff. d. adopt.* n. 12.

Orphans under the age of twenty-five are subject to guardians (1).

According to the general rule, every one who is appointed guardian is bound to accept the office, and may be compelled to undertake it by civil imprisonment (*gijzeling*) in case of refusal (2).

Some persons, however, are prohibited from being guardians, others may excuse themselves from undertaking a guardianship. Among persons prohibited from being guardians, are principally persons who are themselves subject to guardians or curators (3), also all women (4), with the exception of the mother and grandmother, who are allowed to undertake the guardianship of their children or grandchildren, as long as they do not contract a second marriage; sometimes a co-guardian is joined with them, if there are reasons for such a step (5). Military men are not indeed prohibited, but may excuse themselves from taking this office (6). The debtors or creditors of orphans for considerable amounts may, in the discretion of the judge, be prohibited (7). Clerks in the Secretary of State's or Treasury Department, may not allow themselves to be appointed without the knowledge of the authorities (8).

(1) De Groot, *Intro.* 1 B. 7 D. § 3; *Regtsg. Observ.* 2 D. Obs. 8.

(2) *Pr. Inst. de excus. tut.*; De Groot, *Intro.* 1 B. 7 D. § 15.

(3) § 2, *Inst. qui test. tut. dari.* § 13; *Inst. de excus. tut.*

(4) *L.* 16, *L.* 18, *ff. de tutel.*; *L.* 26, *ff. de test. tut.*; *L.* 2, *L.* 73, *ff. de R. J.*

(5) De Groot, *Intro.* 1 B. 7 D. § 11; V. D. Keessel, *Thes.* 122.

(6) V. D. Keessel, *Thes.* 113.

(7) Voet, *ad tit. ff. de tutel. n.* 4.

(8) *Resol. van Gecomm. Raaden.* 1 Feb. 1724; *G. P. D.* 6 D. p. 42.



The reasons for which some persons may decline accepting a guardianship are by our law left to the discretion of the judge (1). As examples we may mention: persons who are already burdened with three guardianships; persons of more than seventy years of age; persons who are scarcely able to look after their own affairs on account of sickness or physical infirmity, etc. (2). If, however, a person is condemned by the court to accept the office in spite of the reasons adduced, and considers himself aggrieved by such decision, he may appeal; and provision is made for the guardianship meanwhile (3).

## SECTION II.

Appointment  
of guardians.

The appointment of guardians is made by will, codicil (4), or by a special deed of guardianship (5), and by the father and the mother, both at the death of the former and of the latter. If they have made no provision for the guardianship, the Orphan Chamber of that place in which the house of the deceased is situated appoints guardians, or, if the Orphan Chamber has been excluded (6), then the *court* of that

(1) S. van Leeuwen, *Cens. For. Part 1, Lib. 1, Cap. 16, n. 20*;  
Voet, *ad tit. ff. de excus. tut. n. 12.*

(2) *D. D. ad tit. Inst. & ff. de excus. tut.*; Lybregts, *Red. Vert. over 't Not. Ambt. 1 D. Chap. 30, n. 16.*

(3) De Groot, *Intro. 1 B. 7 D. § 14.*

(4) *Ibid. § 7, n. 5, & 2 B. 14 D. § 5.*

(5) *Ordonn. van 't Zegel. 1794, Art. 53.*

(6) It has always caused us, and many others as well, the greatest surprise that people are always so ready to exclude the Orphan Chamber in their wills. Should not a public board of administration guaranteed, as it were, by the towns themselves, be infinitely

place (1), which usually appoints the nearest friends who are fit persons (2). In order that there may be no neglect in making this provision for guardianship, it is the general custom to summon the executors or administrators before the Orphan Chamber to produce the will in all cases of persons dying and leaving minor children (3).

Strangers who bequeath anything by way of inheritance or legacy to minors may also provide guardians for them; but this is no *personal* guardianship, affecting the education of the orphans, but only a *real* one, consisting in the administration of the property bequeathed (4).

### SECTION III.

The duty of a guardian consists, first, in making an *inventory* of the property of the orphans (5), or in demanding one from the surviving parent, who remains in the possession of the estate (6). Duty of guardians.

The practice of guardians finding security is in our law fairly out of use; though when there are weighty reasons for doing so, the court may demand it (7).

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preferred to individual persons, of whose fraudulent and negligent administration we have daily so many sad proofs? Very important observations on this subject are to be found in *Vaderl. Letteroeff.* 1791, No. 11; *Mengelw.* p. 475 *et seqq.*

(1) Voet, *ad tit. ff. de tut. & cur. dat. n.* 5.

(2) V. D. Keessel, *Thes.* 117.

(3) De Groot, *Intro.* 1 B. 7 D. § 13. This is also confirmed by all the *Regulations relating to orphans* in our towns and villages.

(4) V. D. Keessel, *Thes.* 118.

(5) De Groot, *Intro.* 1 B. 9 D. § 3.

(6) V. D. Keessel, *Thes.* 135.

(7) De Groot, *Intro.* 1 B. 9 D. § 1; Voet, *ad tit. ff. de adm. et per. tut. n.* 2.

The control of guardians extends either to the *person* or to the *property* of the orphans. With respect to the *person*, the guardian must see to the proper maintenance of the orphans, according to their means, and that they are educated in such a suitable manner, that, when they come of age, they have an honest means of livelihood (1).

With respect to the *property*, they must exercise the same care in the due preservation of all that is of actual value, as a good *paterfamilias*. If the Orphan Chamber is not excluded, it takes care of the securities (2); otherwise the guardian looks after them himself; and when there are several guardians it is most prudent to preserve the securities in an iron chest to which one, without the other, has no access. He must call in outstanding debts with the greatest possible carefulness (3). The moneys collected must be invested in government securities paying interest (4); all other investments, as on mortgages, guarantees and the like, however safe they may appear, require the *previous sanction of the court* (5), in order that the guardian may not become personally liable in case of any unforeseen losses arising from the mortgages or guarantees. And as a rule it is advisable for guardians to obtain such *sanction* in all transactions of considerable importance, e.g. in the continuation or discontinuation of any trade or business (6), in entering into compromises of any

(1) De Groot, *Intro.* 1 B. 9 D. § 9.

(2) *Regtsg. Observ.* 3 D. Obs. 12.

(3) Voet, *ad tit. ff. de adm. et per. tut. n.* 8.

(4) *Regtsg. Observ.* 3 D. Obs. 13; V. D. Keessel, *Thes.* 155.

(5) De Groot, *Intro.* 1 B. 2 D. § 2.

(6) Voet, *ad tit. ff. de adm. et per. tut. n.* 11.

doubtful transactions, and the like (1). The control of the guardianship belongs jointly to all the guardians appointed, and each is responsible for the acts of the other (2).

#### SECTION IV.

Of a more or less peculiar nature is the duty of guardians with respect to the *inventory* or *bewijs* which <sup>Inventory and Boedelhouder-  
schap.</sup> has to be drawn up by the surviving parent upon contracting a second marriage; and so also are the consequences of the guardianship in the case of the surviving parent who, with the minor children, remains in possession of the undivided estate as *Boedelhouder* or *Boedelhoudster*.

With respect to the first duty, or the *inventory* (*vertigting*), if the surviving father or mother wishes to enter into a second marriage, he or she is first obliged to furnish his or her children, by the first marriage, with an inventory of the property which has come to them out of the estate of the first-dying parent (3). For this purpose the father or mother, with the nearest relations of the children as guardians chosen for this purpose, execute a deed in which the value of the property in the inventory is fixed, and which generally contains the condition that the property shall remain under the control of the survivor until the children become of age, so that the children may be brought up in the meanwhile upon the fruits (arising from the property) (4).

(1) Voet, *ad d. t. n. 13 et Ad tit. ff. de transact. n. 2.*

(2) De Groot, *Intro. 1 B. 9 D. § 11.*

(3) *Regtsgel. Observ. 1 D. Obs. 15.*

(4) De Groot, *Intro. 1 B. 9 D. § 6*; Lybregts, *Red. Vert. over t' Not. Ambt. 1 D. 13 Hoofd.*; V. D. Keessel, *Thes. 142-145.*



In this case the office of the guardians is limited to the supervision of the inventory; in this capacity they are bound to examine the condition of the estate very carefully, so that the minors may not be prejudiced by the valuation; but when the deed is executed their office ceases, and they have nothing to do with the administration.

With respect to the *Boedelhouderschap*. If the surviving father or mother, being at the same time guardian of the children, does not draw up a schedule of the property, or make an inventory or *bewijs* thereof, or buy out the interest of the children, the consequence is that the community of goods continues between the survivor and the children, and to the advantage of the latter, who enjoy the half of all the profits that accrue to the estate after the death of the first-dying parent, but not to their prejudice, inasmuch as all losses are borne by the surviving parent (1). At least, this rule applies according to our law, when local statutes have not provided differently upon this point (2).

## SECTION V.

Power of  
guardians.

The *power* of guardians consists, in general, in assisting and representing (3) the minor in all transactions concerning him, and in particular in appearing for him in court (4). In some cases, however, this assistance to the minor is unnecessary. Thus he may, when he has

(1) De Groot, *Intro.* 2 B. 13 D.; V. D. Keessel, *Thes.* 266, *seqq.*

(2) *Regtsg. Observ.* 3 D. *Obs.* 40.

(3) De Groot, *Intro.* 1 B. 8 D.; Voet, *Aliique D. D. ad tit. ff. de auct. et cons. tut.*

(4) De Groot, *d. l.* § 4, n. 6.

arrived at the age of puberty, make a will without his guardian (1). As to marriage, the consent of guardians is unnecessary for its validity, providing the local laws do not expressly require it (2). In criminal cases the minor appears alone, at least so long as the proceedings against him are not by way of ordinary process (3). In other cases, on the contrary, the power of guardians is remarkably limited by law. Thus, he may not bring an action on behalf of the minor without having obtained the previous sanction of the court to sue; if he does bring an action without such sanction, he runs the risk of being condemned to pay the costs out of his own pocket (4). He may not sell or encumber any of the *immovable* property of the minor without having first obtained an order of the court (5). The same must be said of alienations and pledges of government securities (6).

## SECTION VI.

Two actions arise out of guardianship: the one by the ward against the guardian, the other by the guardian against the ward (7). Actions arising out of guardianship.

The first action may be brought by the ward, and those who in case of death succeed to him, against his

(1) De Groot, *d. l.* § 2.

(2) Vide *supra*, p. 21.

(3) *Stijl. van Proced. in Crim. Zaaken*, Art. 61; *en aldaar* V. Leeuwen, *in not.*; Voet, *ad tit. ff. de Jud.* n. 12; V. D. Keessel, *Thes.* 127.

(4) De Groot, *Intro.* 1 B. 8 D. § 4, n. 7; Merula, *Manier van Proced. Lib.* 4, *Tit.* 93, *Cap.* 4, n. 2, *ibique not.*; Voet, *ad tit. ff. de adm. et per. tut.* n. 12.

(5) De Groot, *d. l.* § 6; Voet, *ad tit. ff. de reb. eor.*

(6) V. D. Keessel, *Thes.* 130.

(7) *Actio tutelæ directa et contraria.*

guardians and his heirs, and against each guardian *in solidum*—saving that on satisfaction by one the others are released—to render an account of his administration, to transfer everything which by virtue of the guardianship came under his control; and also to make good all the losses which were caused to the minor by his bad management (1).

The other action lies for the guardian and his heirs against the ward and his successors, to be indemnified for everything which, on account of the guardianship, he paid and expended for the advantage of the ward; also for a reasonable allowance for his time and trouble (2). The amount of this allowance is not uniform, owing to the various customs in different places. But, according to the general rule, the fortieth penning\* ( $2\frac{1}{2}$  per cent.) is calculated upon the receipts, the eightieth penning ( $1\frac{1}{4}$  per cent.) on disbursements, and the hundredth penning (1 per cent.) on the cash found in the estate, on the proceeds of goods sold, and on the proceeds arising from the calling in of principal (3).

## SECTION VII.

How guardianship ends.

### Guardianship ends :

1st. By the death of the minor (4), in which case an account has to be rendered to his heir.

(1) Voet, *ad tit. ff. de tut. et rat. distrach.*

(2) Ibid. *ad tit. ff. d. contr. tut. et util. act.*

\* A penning =  $\frac{1}{16}$  stuiver, or  $\frac{5}{16}$  cent. (Kramer's *Alg. Kundtwk.*).

—Tr.

(3) *Sententie van den Hoogen Raad*, 28 July, 1725, to be found in Lybregts, *Red. Vert. over 't Not. ambt.* 2 D. *Bijl. L.*

(4) § 3. *Inst. quib. mod. tut. fin.*

2nd. By the death of the guardian (1), when the guardianship passes over to the person whom he, having obtained the power to do so by last will, has appointed and *surrogated* in his place, or in default thereof, to the person whom the court appoints as guardian.

3rd. On the majority of the ward, which by our law is the age of twenty-five years (2). In some places, however, an express discharge by the magistrate is required in addition (3).

4th. By the marriage of the minor (4).

5th. By obtaining *venia ætatis* from the sovereign power (5) which has been treated of above (6).

6th. Upon the object which gave rise to the guardianship ceasing, if such guardianship was limited only to a particular transaction (*actus*) (7).

7th. By the removal of the guardian on account of a breach of trust, or on account of his unfitness for the further administration of the guardianship. The sufficiency of these reasons is left to the judgment of the court (8). If it is not accompanied by any actual crime this discharge is given without injury to the guardian's honour (9).

(1) *d.* § 3.

(2) De Groot, *Intro.* 1 *B.* 10 *D.* § 1.

(3) V. D. Keessel, *Thes.* 160.

(4) De Groot, *d. l.* § 2; Voet, *ad tit. ff. de minor. n.* 6; Loenius, *Decis. et Observ. Cas.* 124.

(5) De Groot, *d. l.* § 3; Voet, *ad tit. ff. de minor. n.* 4.

(6) *Supra*, page 32.

(7) De Groot, *d. l.* § 6; Huber, *Hedend. Regtsgel.* 1 *B.* *Cap.* 20, n. 17.

(8) *Ibid.* *d. l.* § 4.

(9) Voet, *ad tit. ff. de susp. tut. n. ult.*; V. D. Keessel, *Thes.* 162.



## SECTION VIII.

## Curatorship.

Thus much about guardians: a few words now upon *curatorship*. As a general rule this corresponds with guardianship (1). The difference between the two consists principally in these two points:

I. The foundation of all guardianship is minority; that of curatorship is some mental or physical infirmity which incapacitates a person from conducting his affairs himself.

Such infirmities are:

*a.* Insanity (2), in which case, if it is accompanied by rabidness, the power of *confinement* is granted together with the curatorship.

*b.* Squandering of property. Such persons are usually called "Hofs-" or "Stads-kinderen" (children of the court or town) (3). In their case also reasons may sometimes exist for confinement, e.g., when excessive drunkenness is the cause of their extravagance, or when there is any fear of their being induced to antedate their obligations.

II. The appointment of guardians is made by individual persons; curators are only appointed by the court, after enquiry into the matter (4). Such an order of curatorship requires a public advertisement, in order that third persons may not be prejudiced by dealing without notice with those persons who are placed under curatorship (5).

(1) De Groot, *Intro.* 1 B. 11 D. § 5; Voet, *ad tit. ff. de cur. fur.* n. 1.

(2) Voet, *ad d. t. n.* 3.

(3) De Groot, *d. l.* § 4; Voet, *ad d. t. n.* 6, 7.

(4) *Ibid.* *d. l.* § 4, n. 6; V. D. Keessel, *Thes.* 164.

(5) Voet, *ad d. t. n.* 8.

III. Curatorship only ceases upon discharge by the court which granted it. This discharge may not only be prayed for upon the cause for the curatorship ceasing, but a person who has been placed under curatorship against his will is entitled, upon stating his grievances, to request the court to recall the appointment; and if those grievances are not redressed he may appeal to the High Court (*reformatie*) notwithstanding the continuance of the curatorship (1).

Besides the above-mentioned curatorship of persons and property, another kind of judicial provision exists affecting property only, and which is therefore not inaptly called *sequestration*: e.g., to appoint a representative for an absentee in inheritances coming to him; to preserve and liquidate a vacant estate, of which the heir is unknown; to administer an abandoned estate encumbered with debts, etc. (2).

Sequestration.

## CHAPTER VI.

### ON THE RIGHTS OF MANKIND *IN REM* AND *IN PERSONAM* IN GENERAL.

#### SECTION I.

THE second object of the law (*objectum juris*) consists in the *things*, in which and to which men have rights (3).

*Jura in rem*  
and *in personam*.

We state advisedly that men have rights *in things*

(1) Vide my *Verhand. over de Judic. Pract.* 1 D. 2 B. Chap. 24, p. 334.

(2) V. D. Keessel, *Thes.* 167.

(3) § *ult. Inst. de Jur. Nat. Gent. et Civ.*

and to things, for these rights are of a twofold nature, and in their consequences are as wide apart as the heavens (1).

examples  
Section II below

The right *in* a thing (*jus in rem*) is that right by which the thing itself is bound to me, so that I may follow up this right in the thing against every possessor whoever he may be.

The right *to* a thing (*jus ad rem vel in personam*) is that right by which not the thing but the person with whom I have dealt is bound to me, so that I have only an action against him for the delivery of the thing promised or for the performance of the act agreed upon. For example, if you are in possession of some property which belongs to me, then I have recourse to my right in the property itself, and reclaim the property as my own, although it may have come into the hands of a third person; but if I have lent you a sum of money, which you fail to repay me at the appointed time, I have no right of *vindicatio* against any property forming part of your estate, but only a personal action against you for payment. If your estate is declared insolvent, then in the former case I claim, as owner, my property, which has never become part of your estate, but in the latter case I rank as concurrent creditor *pro rata* with the others.

## SECTION II.

Various kinds  
of *jura in rem*.

The various *jura in rem* are four in number: 1st, right of ownership; 2nd, right of *succession*; 3rd, right of *servitude*; 4th, right of *pledge or mortgage* (2).

(1) Bockelman in *Tract. de Action. Cap. 4*; Heineccii, *Recit. ad. tit. Inst. de rer. div. pp. 206, 207.*

(2) Huber, in *Prælect. ad tit. Inst. de rer. div. n. 12.*

Some authors have also added the *right of possession*, but less accurately (1); still, on account of its peculiar consequences, it deserves to be noticed separately, after the four kinds of real rights have been treated of.

### SECTION III.

*Jura in personam*, or personal rights, are distinguished according to the various sources of the obligation from which they flow. They can be reduced to four kinds: 1st, those flowing from *contracts*; 2nd, from *quasi-contracts*; 3rd, from *crimes*; 4th, from *quasi-criminal offences* (2). In this order we shall finish the remainder of the first book.

Various kinds  
of *jura in*  
*personam*.

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## CHAPTER VII.

### ON OWNERSHIP, OR RIGHT OF PROPERTY.

#### SECTION I.

OWNERSHIP is that right by which something belongs to a person to the exclusion of all others. It is especially known by its consequences.

In what  
ownership  
consists.

It includes:

1st. The right of enjoying the fruits which result from such thing.

2nd. The right of making such proper use of such thing as the owner pleases.

(1) C. F. Walchii, *Introd. in Controv. Jur. Civ. Sect. 2, Cap. 1*, § 6.

(2) Pothier, *On Contracts and Obligations*, 2 vols. in 8vo, translated by myself, and published with notes.



3rd. The right of altering its form or shape at will.

4th. The right of entirely destroying it at will.

5th. The right of preventing others from making use of it.

6th. The right of alienating it or of transferring to others any other sort of right, e.g., the use of it (1).

Ownership is not complete when all these consequences are not found. All this must be understood, however, subject to this qualification, viz., that neither the provisions of the law are transgressed nor the rights of third persons injuriously affected (2).

## SECTION II.

How owner-  
ship is  
acquired.

The modes in which the right of ownership is acquired are the following :

I. *Occupatio*, or simple apprehension : provided in this case that the thing does not belong to any person (3), or a theft is committed. Under this mode of acquisition may be classed :

*a.* The right of hunting wild animals (4). In former times this right was mostly confined to the nobles and those persons who had obtained it by the special favour of the Count (5). Nowadays less importance is attached to these exclusive privileges ; so

(1) Pothier, *Traité du Droit de Domaine de Propriété*, Part 1, Cap. 1, n. 5.

(2) *Ibid.* d. l. n. 14.

(3) *L. 3. pr. ff. de acq. rer. dom.*

(4) *L. 1, § 1, eod.*

(5) De Groot, *Intro. 2 B. 4 D. § 25-21* ; *Regstg. Observ. 1 D. Obs. 27-29* ; & 3 *D. Obs. 30* ; J. Rendorp, *Verhandeling over het Recht van de jagt.* (Amst. 1777) ; and J. Dierquens, *Aanmerk. op 't zelve* ('s Hage, 1778).

*hunting.*

that, among other things, every one may hunt on his own property (1). It was soon found that the unlimited hunting on the downs and other public places would have ere long spoilt the chase, and recourse had to be had to the old laws and customs which were in force before the year 1795 (2).

*b.* The right of *fowling*. In this respect also the ancient exclusive privileges of the nobles (3) are now very much restricted, and the observations we have just made with regard to hunting are applicable here also (4).

*c.* The right of *fishing*. Every one may fish in the sea (5); also, in public weirs and waters, with the rod (6). Both fishing with nets and other gear, and the season when fishing is prohibited, are regulated by various statutes (7), which by the last *Proclamations* on this subject have again been declared to be in full force (8).

*d.* Finding unowned property, or property of which the ownership has been abandoned by another person. To this class belong expensive shells or precious stones found on the sea-shore (9); uninhabited islands discovered at sea (10); treasure trove—if found on one's

(1) *Public. Holl.* 26 Jan. & 28 July, 1795.

(2) *Public. van 't Uitv. Bewind*, 28 Oct. 1799.

(3) De Groot, *Int.* 2 B. 4. D. § 6-16; *Regtsg. Obs.* 1 D. Obs. 24; 3 D. Obs. 26, 27, 28; and 4 D. Obs. 17.

(4) Vide the above-mentioned *Proclamations* of 1795 and 1799.

(5) De Groot, *Int.* 2 B. 4 D. § 17.

(6) *Ibid.* *Int.* 2 B. 1 D. § 28, & 4 D. § 18.

(7) *Ibid.* *Int.* 2 B. 4 D. § 23.

(8) *Public. Holl.* 18 Aug. 1795, and 10 Feb. 1796; *Publ. van 't Uitv. Bew.* 28 Oct. 1799, Art. 15.

(9) *L.* 3 ff. *de divis rerum*.

(10) De Groot, *Int.* 2 B. 4 D. § 33; V. D. Keessel, *Thes.* 190.

own property it belongs to the finder, if found on the property of another person, one half belongs to the finder and the other half to the owner (1), notwithstanding that the Commissioner of Crown Lands also once put forward some claim to it (2).

Before it can be said that another person has abandoned his property such intention must clearly appear. Therefore stray animals, a lost purse of money, or other lost valuables cannot be appropriated by *occupatio* (3), but efforts are bound to be made by means of criers, advertisements, notices to the officers of justice, and similar means, to discover the true owner. And more especially, shipwrecked goods washed up on shore cannot be appropriated without becoming guilty of the crime of plundering wrecks (*Strandroof*). The Salvage Commissioners are authorized to take these shipwrecked goods into their care and custody, and the owners may recover them on paying salvage (4).

*e.* Booty seized from the enemy (5); nevertheless military custom and maritime law should be followed in its distribution (6).

II. Another mode of acquiring ownership is called *accessio*, or when anything accrues to our property. By virtue thereof we are the owners of everything

(1) V. D. Keessel, *Thes.* 198.

(2) De Groot, *Int.* 2 B. 4 D. § 38. Bort, *Tract. van de Domein. van Holl.* 7 D. n. 18, *seqq.*

(3) *Ibid.* *Int.* 2 B. 1 D. § 52.

(4) *Ibid.* *Int.* 2 B. 4 D. § 36; *Plac. Holl.* 22 July, 1722, in the *G. P. B.* 9 D. p. 811.

(5) *Ibid.* *Int.* 2 B. 4 D. § 34.

(6) Voet, in *Tract. de Jur. Milit.* Cap. 5, and *Ad tit. ff. de acq. rer. dom.* n. 8; *Regtsq. Observ.* 3 D. Obs. 31; V. D. Keessel, *Thes.* 191, 192.

which our own property produces; e.g. of the young animals born of our cattle, the produce grown on our land (1), etc. Whatever is thrown against our land through the ebb and flow of the river is acquired by way of accretion (2). Everything erected or planted on a person's land belongs to the owner of the ground; and everything which for the sake of ornament is interwoven with any property or attached to it, is forfeited to the owner of that property, saving to the other his right of compensation (3).

III. In most cases *ownership* is acquired by *delivery* or *transfer* (4). A distinction must be drawn in this case between movables and immovables.

The delivery of *movables* takes place by one person handing them over to another; also, more shortly, by handing over the keys of the room or warehouse in which the goods are (5).

The delivery, however, of movables which have been sold, does not transfer the ownership unless the purchase money is paid, or the sale is made on credit (6). If the sale takes place for cash, and payment does not follow, the vendor may within a short time, generally six weeks, reclaim the goods sold (7). It is more doubtful whether this *vindicatio* can take place if the vendee, who has bought on credit,

(1) § 19. *Inst. de rer. div.*

(2) *L. 7, § 1, ff. de acq. rer. dom.*; De Groot, *Int. 2 B. 9 D.*; *Regtsg. Observ. 4 D. Obs. 21-25.*

(3) De Groot, *Int. 2 B. 10 D.*

(4) *L. 20, C. de pact.*

(5) § 45, *Inst. de rer. divis.*; *L. 9, § 6, ff. de acq. rer. dom.*

(6) § 41, *Inst. de rer. div.*; De Groot, *Int. 2 B. 5. D. § 14.*

(7) *Regtsg. Observ. 3 D. Obs. 33.*



becomes bankrupt shortly after, and has thus committed a clear fraud (1).

The ownership of *immovable* property does not pass unless the transfer is executed before the court of that place in which the property is situated, and the duty of the fortieth penning ( $2\frac{1}{2}$  per cent.), and, in addition, one-tenth of the purchase-money is paid to Government (2).

IV. Lastly, ownership is acquired by *prescription*, by which is meant here the uninterrupted possession for the third of a century (3).

### SECTION III.

Action arising  
out of owner-  
ship.

The action which may be brought by the owner in virtue of his right of ownership is called *reclame*, or *rei vindicatio* (4). It is a real action, and lies for the owner of any property, movable or immovable, corporeal or incorporeal, against the possessor thereof, or any person who has *malâ fide* deprived him of the possession, to take his hands off the property, and to deliver it up to the owner; and also for all the fruits still in existence; and, in the case of a *malâ fide* possessor, for all those which he has already enjoyed, or which he could and should have enjoyed; subject, however, to a deduction of the expenses which

(1) Bynkershoek, *Quæst. Jur. Priv. Lib.* 3, *Cap.* 15; V. D. Keessel, *Thes.* 204.

(2) *Regtsg. Observ.* 3 D. Obs. 32; *Plac. of Emp. Charles*, 10 May, 1529; *Ord. op den 40 penn.* 9 May, 1744.

(3) De Groot, *Int.* 2 B. 7 D.; Matthæi, *Paroem.* 9; Loenius, *Decis. et Obs. Cas.* 76.

(4) *Rei vindicatio*.

the possessor has been put to on account of the property (1).

#### SECTION IV.

How ownership is lost (2) may to some extent be gathered from what has been said in Section II. It happens either with or without our consent. With our consent, when the ownership is transferred to another person by delivery or transfer, or is entirely surrendered and abandoned (3), provided that in this case also the intention of abandonment is clear: thus, e.g., by the jettison of goods in stormy weather, in order to lighten the ship, the ownership of such goods is not lost (4). Ownership is lost against our will, when our property is taken in execution or when, by order of the authorities, it is taken from us for the public benefit. But in the latter case it cannot take place without fair compensation (5). So also by *prescription* (6). But not by mere loss of possession, although we do not know what has become of the property (7); unless it is of such a nature that originally no one was the owner thereof. Thus we lose the ownership in wild beasts as soon as they escape us (8).

How ownership is lost.

(1) Voet, *aliique D. D. ad tit. ff. de reivind.*; Pothier, *Traité du Droit de Propriété, Part 2, Cap. 1, pp. 449-486*; De Groot, *Int. 2 B. 6 D.*

(2) De Groot, *Int. 2 B. 32 D.*

(3) *L. 1, ff. pro derel.*

(4) *L. 9, § 8, ff. de acq. rer. dom.*; *L. 8, ff. de Leg. Rhod.*

(5) This is called *Jus domini eminentis*, on which consult Bynkershoek, *Quæst. Jur. Publ. Lib. 2, Cap. 15*; S. de Cocceji, *Dissert. Proëmial. ad Grotium, de J. B. ac P. Diss. 12, § 629, n. 2, p. 560.*

(6) *L. 20, C. de pact. t. t. ff. de præscript.*

(7) *L. 44, ff. de acq. rer. dom.*

(8) *L. 3, § 2, L. 5, L. 14, § 1, ff. de acq. rer. dom.*

## CHAPTER VIII.

### ON SUCCESSION IN GENERAL.

#### SECTION I.

Right of  
succession.

THE second kind of *real rights*, or *jura in rem*, is the right of succession. A person who is entitled to an inheritance or a part thereof, as heir, or has acquired a title as legatee to any property, succeeds to all the rights of the deceased, so that the ownership acquired by the heirs or legatees is deemed a new species of ownership (1). This ownership, however, is not acquired *ipso jure*, but by taking possession (2).

#### SECTION II.

Of two kinds.

The mode of acquiring a right of succession is twofold, viz.: by last will, or *ab intestato*. We shall treat of each in the two following chapters.

Succession arising from contract (3), though accepted in our law, especially in antenuptial contracts, we class, in respect of its consequences, with succession by last will (4).

#### SECTION III.

Actions arising  
thereout.

Since the right of succession is a kind of real right, it gives rise to a real action (5). It is allowed to

(1) *L. 37, ff. de acq. vel om. her.*; De Groot, *Int. 2 B. 32 D.* § 2.

(2) De Groot, *Int. 2 B. 2 D.* § 12, *n. 14*; Voet, *ad tit. ff. de acq. vel. om. her. n. 18*; V. D. Keessel, *Thes.* 182.

(3) *Successio practitia.*

(4) *Vide supra, p. 16.*

(5) Known at law by the name of *petitio hereditatis*.

every person who is entitled, as heir, to an inheritance or a part thereof, against the possessor of the whole or part inheritance (whether he possesses it as heir, or simply as possessor), in order to be declared heir, and that the inheritance and all that belongs to it, together with all the fruits, advantages and profits thereof, actually enjoyed, or which might have been enjoyed, may be handed over to him (1).

Since the legatee, by his succession, also acquires the ownership in the property bequeathed, he has, besides the personal action against the heir, a real action for the vindication of that property (2).

## CHAPTER IX.

### ON SUCCESSION BY LAST WILL.

#### SECTION I.

A LAST will, i.e. the disposition which a person desires shall be made of his property after his death, is only valid when the proper forms are observed; these vary accordingly as the will is *open* or *closed*. Different kinds of wills.

An *open will* is made in the presence of a notary and two witnesses, or of two members of the Lower Court and the Secretary \* (3). The notary must be a duly admitted notary of the place where he executes

(1) Voet, *aliquæ D. D. ad tit. ff. de her. pet.*

(2) *L. 1, C. comm. de legat. § 2; Inst. de legat. ; De Groot, Int. 2 B. 23 D. § 18.*

\* Registrar.—Tr.

(3) *De Groot, Int. 2 B. 17 D. §§ 17, 18; Regtsq. Observ. 3 D. Obs. 44.*



the testament (1). The witnesses must be males, above the age of fourteen years, who are not for any reason prohibited from being witnesses, and who take no interest under the will (2). The testator must be known to the notary, or at least to the witnesses (3). Although it is very necessary that the testator should sign in the presence of the notary and witnesses (4), yet a will clearly declared by word of mouth must be followed as a valid will, in case the testator should die before the minute was properly drafted, and was thus unable to sign (5). It must be written upon a properly stamped paper, the stamp being calculated according to the value of the testator's property or the office which he holds (6).

A *closed will* is reduced to writing by the testator himself or by some other person by his direction, provided such person takes no interest under the will (7), upon a paper, properly stamped, signed by him and thus presented to the notary, who, in the presence of two witnesses, encloses it in a wrapper, seals it on the outside of the wrapper, and makes the necessary minute thereof, which is thereupon called an *acte van superscriptie* (8). Any person making his will in this

(1) *Regtsq. Observ.* 1 D. Obs. 39; & 4 D. p. 405; Lybregts, *Red. Vert. over 't Nat. ambt.* 2 D. *Bijl. Litt. B.*

(2) De Groot, *Int.* 2 B. 17 D. § 21; Voet, *ad tit. ff. qui test. fac. poss. n.* 22.

(3) De Groot, *d. l.* § 22; Lybregts, *Red. Vert.* 1 D. pp. 14-24.

(4) Voet, *ad tit. ff. qui test. fac. poss. n.* 23; Bynkershoek, *Quæst. Priv. Jur. Lib.* 3 C. 5 & 8.

(5) See my *Verzameling van Gewijsden*, 1 D. Cas. 25.

(6) *Ordonn. op 't Zegel*, 1794, Art. 51.

(7) Bynkershoek, *Quæst. Jur. Priv. Lib.* 3, C. 8.

(8) De Groot, *Intro.* 2 B. 17 D. § 25; Lybregts, *Red. Vert.* 1 D. Chap. 19, n. 29, *seqq.*

manner must be careful to keep it intact and unopened, or it loses its force (1). When such a will becomes confirmed by the death of the testator, it is opened by a notary, in the presence of witnesses, upon it appearing to them that the seals are entire and intact, and an *acte van opening* \* is made thereof, the original will being preserved in the protocol of the notary (2).

Besides these two ways of making a will, it is competent, by our law, for any one to make a non-cupative will in the presence of seven witnesses, after the manner of the Romans ; but this mode is now very seldom used (3).

## SECTION II.

Besides testaments, another less perfect kind of last will is also known, which is termed *codicil* (4). In respect of form codicils and wills are nearly the same (5). The actual differences between them are limited to these two points:—

(1) Voet, *ad tit. ff. de his, quæ in test. del. n. 1.*

\* This deed must contain: the capacity of the appearer or appearers, who must be known to the notary or the witnesses, since no person is entitled to demand that a closed will should be opened who is not related to the deceased by the nearest ties of blood ; a statement that *the closed document* containing the *superscription* (vide *supra*) made by notary, N. N., in the presence of witnesses, and properly signed, and of which the seals were intact and uncanceled, was delivered to the notary by the appearer, and that at his request it was opened, and contained the following will. The will is then set out.—TR.

(2) Lybregts, *Red. Vert. 1 D. Chap. 19, n. 36, seqq.*

(3) Voet, *ad tit. ff. qui test. fac. poss. n. 20* ; V. D. Keessel, *Thes.* 293.

(4) De Groot, *Intro. 2 B. 25 D.* ; Voet, *ad tit. ff. de jur. codicill.*

(5) Voet, *ad d. t. n. 5.*

1st. No direct institution of the heir can be made by a codicil; for this purpose a will is necessary.

2nd. A will can never be contained in an underhand, (i.e. non-notarial) instrument, whereas a codicil may, if the testator has by his will reserved to himself this power, which is called the *clausule reservatoire* (reservatory clause) (1).

### SECTION III.

Who compe-  
tent to make  
a will.

Every one, both male and female, if not expressly prohibited by law, is competent to make a will. Among prohibited persons are classed (2):

1st. Persons who, by reason of a mental or physical infirmity, have been deprived of the administration of their property, e.g., lunatics and spendthrifts. The latter are nevertheless allowed to make a will if they do so after leave \* has been obtained, and in favour of their blood relations (3).

2nd. Persons who have not yet attained the age of puberty, which for males is fourteen and females twelve years (4).

3rd. Persons born deaf and dumb, and who are thus unable to make known their will (5). Persons who become thus afflicted after birth would act most prudently in applying for leave \* to make a will (6).

(1) Bynkershoek, *Quæst. Jur. Priv. Lib.* 3, *Cap.* 4 & 5.

(2) *Testamenti factio activa.*

\* That is, the consent of the sovereign.—Tr.

(3) Voet, *ad tit. ff. qui test. fac. poss. n.* 34; *Regtsg. Obs.* 2 *D.* Obs. 37.

(4) *Regtsg. Obs.* 3 *D.* Obs. 14.

(5) De Groot, *Intro.* 2 *B.* 15 *D.* § 6.

(6) *Regtsg. Obs.* 2 *D.* Obs. 38.

4th. Persons who, out of hatred for any religion, would desire to make their will to the prejudice of some person (1).

5th. Persons supported in some asylum, which has a preferent claim to succeeding to the property of the people maintained by it (2).

In order to make a will, children do not require the consent of their parents, nor orphans that of their guardians (3), nor wives that of their husbands (4). The last-mentioned persons are mostly accustomed to make a last will together, which is termed a *mutual will*. Although contained in one document (5), it is held to be two distinct wills, in which each disposes of his or her own estate, and which therefore each may revoke, whether jointly or separately (6).

#### SECTION IV.

Who may take under and by virtue of a will? (7) Who may take under a will.  
Again, everybody who is not expressly prohibited from doing so by law. Among these may be classed:

1st. Dispositions in favour of Roman Catholics in orders or Roman Catholic religious institutions (8),

(1) V. D. Keessel, *Thes.* 277-279; and my *Verz. van Gewijsden*, 1 D. *Cas.* 17.

(2) *Resol. Holl.* June 6, 1733, *G. P. B.* 6 D. p. 491; & 17 Dec. 1766, *G. P. B.* 9 D. p. 217.

(3) Voet, *ad tit. ff. qui test. fac. poss. n.* 43.

(4) De Groot, *Intro.* 1 B. 5 D. § 25.

(5) De Groot, *Intro.* 2 B. 17 D. § 25.

(6) Loenius, *Decis. & Observ. C.* 137, and *aldaar* Boel *in not.*

(7) *Testamenti factio passiva.*

(8) *Plac.* 4 May, 1655, *G. P. B.* 1 D. p. 1592.



which, however, must not be extended to include Roman Catholic almshouses or charitable institutions (1).

2nd. Bequests and gifts of immovable property, or property standing on the same footing as immovable property, by minors in favour of their guardians, curators, and administrators, or their children (2).

3rd. Persons who have contracted a clandestine marriage, or who have eloped with each other, may not benefit each other (3).

4th. Bastards begotten in adultery or incest may not be benefited with more than that which is required for their necessary maintenance (4). One may leave to other illegitimate children as much as one pleases; unless one has at the same time legitimate children, in which case only a twelfth part may be left to the former (5).

5th. A second husband or wife may not receive more than the smallest portion which has been left to one of the children by the former marriage (6).

## SECTION V.

Legitimate  
portion. —

According to the general rule the appointment of heirs is voluntary, so that one may leave something to another person or not, as one pleases. But it is subject, however, to an exception in the case of *children* and

(1) Bynkershoek, *Quæst. Jur. Priv. L. 3, C. 1*; *Resol. Holl. 24 Feb. 1729, G. P. B. 6 D. p. 355.*

(2) *Placaat of Emperor Charles of 4 Oct. 1540, Art. 12*; Bynkershoek, *Quæst. Jur. Priv. L. 3, C. 3.*

(3) *Plac. 4 Oct. 1540, Art. 17*; *Plac. Holl. 25 Feb. 1751, G. P. B. 9 D. p. 535.*

(4) De Groot, *Intro. 2 B. 16 D. § 6.*

(5) V. D. Keessel, *Thes. 287.*

(6) *L. 6, C. de sec. nupt.*

their descendants, to whom the parents are bound to leave, either by way of inheritance or legacy, at least the *legitimate portion*, which amounts to *one-third* of the estate for the children jointly, if there are *four* children or less than four; to *one-half* if there are *five* or more (1). *Parents* are also entitled to this *legitimate* provided that they would be heirs *ab intestato*. *Brothers* and *sisters* are not thus entitled unless an infamous person is appointed heir (2).

For very weighty reasons, defined by the law (3), an entire *disherison* may be made; but in such a case the will must be executed judicially, or at least two *schepenen* \* must be used as witnesses (4).

ordinary  
ridges 247

## SECTION VI.

An important point in all wills is the *institution* or Institution of heir. appointment of one or more persons as heir (5). Provided the intention of the testator appears clear (6), it does not matter in what terms (7), by what descriptions (8), in what part of the will (9), from or until what time (10), whether for equal or unequal shares, or conditionally or unconditionally (11), the

(1) Nov. 18, Cap. 1; Voet, *aliquae D. D. ad tit. ff. de inoff. test.*

(2) Voet, *ad d. t. n.* 42; Loenius, *Decis. & Observ. Cas.* 85.

(3) L. 34, L. 36, § 2, *C. de inoff. test.*

\* Vide *infra*, Book 3, Chap. 1, § 1.—Tr.

(4) *Eed der Notar. Art.* 4.

(5) *t. t. ff. de her. inst.*

(6) L. 62, § 1, *ff. d. t.*

(7) L. 1, §§ 5-7, L. 48, *pr. ff. d. t. L. 7, C. de testam.*

(8) L. 34, *ff. de cond. & dem.*

(9) § 34, *Inst. de legat.*

(10) De Groot, *Intro.* 2 B. 18 D. § 21.

(11) *t. t. ff. de cond. inst. t. t. de cond. & dem.*

institution is made. With respect to *conditions*, however, it must be observed that they must relate to something which has not yet happened (1) \*; that they must be capable of being performed, for impossible conditions are held *pro non scriptis* (2); that they must not be contrary to *bonos mores* (3), nor cause any confusion or obscurity in the will of the testator (4). A condition to the effect that something *shall not be done* is legal, and the heir is compelled to give security for the performance of the condition (5).

When several persons are jointly instituted as heirs, and one or more of them are wanting at the death of the testator, their shares accrue to the survivors, unless each of the heirs has been appointed to a separate portion. This right is termed the *jus accrescendi* (6).

(1) *L. 10, § 1, L. 11, L. 68, ff. de cond. & dem.; L. 45, § 2, ff. de leg. 2.*

\* If a legacy is left subject to the condition, "if the ship shall arrive from Asia," and the ship had arrived at the date of making the will, although the testator was not aware of it, the condition is held to be fulfilled (*ff. L. 35, tit. 1, l. 10, 1*). If left subject to the condition, "on her marriage," and the legatee was married, and the testator knew it, then a second marriage is understood, and it is immaterial whether this takes place during the life or after the death of the testator (*ff. L. 35, tit. 1, l. 68*). If a father directs his heir to give a certain sum of money to his daughter on her marriage, and she was married at the date of the will, although the father was an absentee and unaware of it, nevertheless the legacy is due; but if the father was aware of it, he must be held to have intended a second marriage (*ff. 31, tit. 1, l. 45, 2*).—TR.

(2) *L. 3, ff. de cond. & dem.; L. 1, ff. de cond. inst.; Voet, ad tit. ff. de cond. inst. n. 16.*

(3) *L. 14, ff. de cond. inst.*

(4) *L. 16, ff. de cond. inst.*

(5) *L. 7, pr. ff. de cond. & dem.*

(6) *V. D. Keessel, Thes. 326.*

## SECTION VII.

As it may easily happen that a person appointed Substitution. heir, either by predeceasing the testator, or for some other reason, may not be able or is unwilling to be heir, it is prudent to appoint a second or third heir on failure of the heir first-appointed. Such appointment bears the name of *substitution* (1). Besides this *substitutio vulgaris*, two other kinds known were known to the Romans.

1st. Pupillary substitution, or *substitutio pupillaris*, by which a father appointed the persons who should be the heirs of his child under the age of puberty, in case the latter should happen to die under the age of puberty (2); this has not been adopted by us (3), although indeed “*the choice of the common law*” (*verkiezing van het Landrecht*), by which parents may select a particular law of succession as to their children’s property (4), in some degree resembles it.

2nd. The quasi-pupillary substitution, or *substitutio exemplaris*, by which parents may direct the succession to the property of their insane children, should they die in the condition of insanity (5). The validity of this substitution in our law has been established by judicial decisions (6).

(1) *t. t. ff. de vulg. & pup. subst.*

(2) *L. 2, pr. ff. d. t.*

(3) De Groot, *Intro.* 1 B. 6 D. § 3; and 2 B. 19 D. § 9.

(4) De Groot, *Intro.* 2 B. 29 D.

(5) § 1, *Inst. de pup. subst.*; *L. 9, C. de impub. & al. subst.*

(6) *Regtsgel. Observ.* 1 D. Obs. 41.



## SECTION VIII.

Fideicommissa  
(Trusts).

Sometimes a person is appointed heir subject to the charge, that after the death of the appointed heir the property shall go over to a third person (1). This is termed *fideicommissum*. This charge may be imposed by the testator upon all who take any interest under his will (2), except upon his children in so far as their legitimate portion is concerned (3). This must always be left to them unincumbered, and only the excess can be burthened with a *fideicommissum*. In practice, however, the rule has been adopted that a father may leave his child the choice to declare—by executing a deed to that effect, very often by judgment of the court—whether he will take the legitimate portion free and unburthened, the surplus in such case going over to third persons, or whether he will renounce the legitimate portion, and in lieu thereof receive a child's portion of the entire inheritance, subject to the burthen of *fideicommissum* (4).

It is immaterial in what terms the *fideicommissum*

(1) *Tit. Inst. de fideic. hered. t. t. ff. ad SCt. Trebell.*; Thevenot, *Traité des Substitutions Fideicommissaires* (Paris, 1778, in 4to).

(2) *L. 1, § 6, ff. de legat. 3.*

(3) *L. 28, ff. de legat. 2*; *L. 32, C. de inoff. testam. Nov. 39, Cap. 1.*

(4) This practice certainly does not agree very well with the object of the law as to leaving children their legitimate portions unburthened, and is an *indirect* mode of doing what it is not legal to do directly (Schotani, *Exam. Jurid. ad tit. ff. de inoff. test. quest. 27*). But it is so generally adopted, and has been established by so many judgments of the courts of justice, that its validity cannot be doubted. See, moreover, Lybregts, *Red. Vert. 1 D. 28 C. n. 6.*

is created (1), provided that the person to whom the property is to go over is clearly pointed out. A simple restraint on alienation, without declaring in whose favour it is made, has no obligatory force (2); but a restraint, for example, on the alienation of the property out of the family is valid (3).

Fideicommissary substitutions are of various kinds:

1st. A pure fideicommissum, not subject to any condition (4).

2nd. A conditional fideicommissum, which only passes over upon the happening of a certain specified event, and indeed, not otherwise, e.g., in case the heir dies without children (5). This condition is even tacitly implied whenever any one in the ascending line imposes a universal fideicommissum upon any of his descendants (6).

3rd. A fideicommissum with consecutive degrees, namely, when the substituted heirs are in like manner burthened with a delivery over to other persons (7).

4th. A fideicommissum affecting either the entire inheritance or a portion thereof, or a particular piece of property (8).

5th. A reciprocal fideicommissum, when two persons are mutually burthened, one in favour of the other (9).

(1) *L. 2, C. comm. de legat.*

(2) This is usually called a *nudum præceptum*, *L. 114, § 14, ff. de legat. 1; L. 38, § 4, ff. de legat. 3.*

(3) *L. 69, § 3, ff. de legat. 2.*

(4) *L. 41, § 14, ff. de legat. 3.*

(5) *L. 114, § 13, ff. de legat. 1.*

(6) *L. 202, ff. de cond. & dem.; L. 30, C. de fideic.*

(7) *L. 1, § 7; L. 41, § 14, ff. de legat. 3.*

(8) *t. Inst. de sing. reb. per fideic. rel.*

(9) *L. 77, § 13, ff. de legat. 2; L. 16, C. de pact.; L. 11, C. de transact.*

6th. A fideicommissum upon the residue which shall remain unspent (1). The effect of this is that one-fourth at least of the property must be allowed to go over to the substituted heir (2).

The substituted person has no right to the fideicommissum until the event happens upon which he was appointed, e.g., on the death of the person appointed heir (3). He must therefore at that time be competent to be able to inherit (4). He does not transmit the fideicommissum to his heir, if he himself did not become entitled to it, e.g., if he died before the person appointed heir (5).

An heir charged with a fideicommissum possesses an actual though burthened ownership (6), and therefore differs from a usufructuary of goods, the naked ownership in which is meanwhile left to others, who transmit such ownership to their heirs, although they should happen to die before the usufructuary (7). However, the effect of a fideicommissum is also that the heir, so long as the fideicommissum has not to be paid over, enjoys the fruits thereof (8); that he retains the property under his administration unless the testator has appointed a special administrator (9); that

(1) *L. 70, § 3, ff. de legat. 2; L. 54, L. 58, § 8, ff. ad Scit. Trebell.*  
This is called a *fideicommissum residui*.

(2) *Nov. 108, Cap. 1; De Groot, Intro. 2 B. 20 D. § 13.*

(3) *L. un. § 7, C. de caduc. toll.*

(4) *L. 52, ff. de legat. 2.*

(5) *L. 3, L. 5, ff. quand. dies legat. ced.; L. 17, ff. de legat. 2 L. 54, ff. de Reg. Jur.*

(6) *L. 54, ff. de acq. vel. om. hered.*

(7) *Voet, ad tit. ff. de usufr. n. 13.*

(8) *L. 83, ff. de leg. 3; L. 57, ff. ad Scit. Trebell.*

(9) *Lybregts, Red. Vert. 1 D. 30, Cap. n. 4.*

he must exercise this administration like a good *paterfamilias* (1); that he must maintain the fideicommissary property in a proper state (2); that he must make a proper inventory of the property burthened with a fideicommissum (3), and, lastly, for the benefit of the remainder man, he must give security for the delivery up of the property burthened (4).

The person in possession of any fideicommissary property has, however, no power to pledge or alienate that property as he pleases (5), except for the payment of the debts with which the property itself is charged (6), or with the consent of all the remainder men (7), or for reasons of pressing necessity (8). In which case, however, the previous authority and release of the court ought to be obtained.

When the time for handing over the fideicommissum has arrived the heir must allow it to pass to the person substituted (9), saving to the heir the right of retaining for himself a fourth part thereof, which is called the *trebellian* portion (10). This deduction, however, is generally prohibited by the last will (11). According to the canon law children charged with a

(1) *L. 22, § 3, ff. ad SCt. Trebell.*

(2) *L. 7, § 2, ff. de usufr.*

(3) *Nov. 1, Cap. 2, § 2.*

(4) *t. t. ff. t. leg. vel fid. serv. caus. cav.*

(5) *L. 3, §§ 2-4, C. comm. de legat.*

(6) *L. 1, § 18, ff. ad SCt. Trebell.; L. 78, § 4, ff. de legat. 2; L. 15, C. de legat.*

(7) *L. 12, § 1, ff. de legat. 1; L. 11, C. de fideic.*

(8) *Nov. 39, Cap. 1.*

(9) *L. 27, § 11, ff. ad SCt. Trebell.*

(10) *De Groot, Intro. 2 B. 20 D. § 6.*

(11) *Auth. sed cum C. ad leg. Fulc.*



universal fideicommissum are allowed to deduct both the legitimate and trebellian portions (1).

The fideicommissa end :

1st. By failure of the condition upon which they were created (2).

2nd. When the remainder man dies before the heir (3) or becomes incapable of inheriting (4).

3rd. By destruction of the fideicommissary property without the fault of the heir (5).

4th. By a renunciation clearly made by the remainder men (6).

5th. In case the heir charged with the fideicommissum has predeceased the testator, and the appointment of heir has thus fallen to the ground (7).

6th. By obtaining a release from the fideicommissum. This can only be obtained from the sovereign; and then only for lawful reasons and with the consent of all the persons to whom the fideicommissum would have to pass over (8).

## SECTION IX.

Legacies.

Among the several dispositions which may be made by will, *legacies*, above all, deserve to be mentioned (9).

(1) *Cap. Raynutius X. de testam.*; De Groot, *Intro.* 2 D. 20 D. § 10; Vinnius, *Sel. Quæst. Lib.* 2, *Cap.* 29.

(2) *L.* 49, §§ 1-3, *ff. de legat.* 1; *L.* 21, *ff. quand. dies leg. vel fid.*; *L.* 12, § 2, *ff. fam. excisc.*

(3) *L.* 17, *L.* 60, *ff. de legat.* 2; *L.* 4, *ff. quand. dies legat.*

(4) *L.* 10, § 1, *ff. de his, quæ ut indign.*

(5) *L.* 26, § 1, *ff. de legat.* 1; *L.* 22, § 3, *ff. ad Sct. Trebell.*

(6) *L.* 26, *C. de fideic.*; *L.* 34, § 2, *ff. de legat.* 2.

(7) *L.* 81, *ff. de legat.* 2; *L.* 23, *ff. de legat.* 3.

(8) *Plac.* 23 July, 1670, *G. P. B.* 3 D. p. 491; vide also my *Verhandel. over de Judic. Pract.* 2 D. 4 B. *Cap.* 7, § 9.

(9) *t. Inst. de legat. t. t. ff. de legat. & fideic.* (*Lib.* 30-32, *Digest*); Pothier, *Verhand. van Legaten*, translated and published by myself.

All persons who may make a will may bequeath legacies, and all persons who may take under a will may have legacies bequeathed to them. Legacies, however, are void—

1st. When it is impossible to decide in favour of *whom* the testator intended to bequeath anything (1); on the other hand, if his intention is convincingly apparent, an error in the name or description is immaterial (2).

2nd. When it is impossible to discover *what* the testator intended to bequeath (3). In this case also an error in the name or description of the legacy is immaterial, provided only that the intention can be gathered (4); and so is an error in the motives assigned (5).

It is lawful for a person to charge the person appointed as his heir to give or perform something, and if he does not give or perform it, to charge him with a legacy, or payment to, a third person, provided the donation or performance is not contrary to public honesty or the laws (6).

Invalid, however, are legacies given for the purpose of bringing obloquy upon any one (7), or made out of pure caprice (8), or clearly tending to reward vice (9),

(1) *L. 10, ff. de reb. dub.*

(2) *L. 33, L. 34, ff. de cond. & dem.; L. 48, § 3, L. 58, § 1, ff. de her. inst.*

(3) *L. 73, § 2, ff. de Reg. Jur.*

(4) *L. 7, § 1, C. de legat.; L. 75, § 1, ff. de legat. 1; L. 1, § 8, ff. de dote præleg.*

(5) *L. 17, § 2, L. 72, § 6, ff. de cond. & dem.*

(6) *L. un. C. de his. quæ poen. caus.; Voet, ad eund. tit. ff. n. 3.*

(7) *L. 54, ff. de legat. 2; L. 48, § 1, ff. de her. inst.*

(8) Pothier, *Verh. van Legaten* 1, Cap. 8, § 9.

(9) Pothier, *ibid.* § 10.

or made for the purpose of obtaining inheritances, or if extorted by misrepresentation and corruption (1), or which depend entirely upon the will of the heir (2).

Every one who has been benefited in any way as heir or legatee by the deceased may be charged with the payment of legacies (3).

Not only one's own property, but also that of one's heir, and of third persons, may be bequeathed. The heir, or he who is charged with such a legacy is bound to buy that property from the person to whom it belongs in order to hand it over to the legatee, or, *in case the owner should be unwilling to sell it, to pay him its value* (4). If the property bequeathed already belongs absolutely and irrevocably to the legatee, the legacy bequeathed is void (5), unless he acquired the property by purchase or by a similar title, when the heir is bound to repay him the price which it cost him to become owner of it (6). Legacies of things *extra commercium* are void (7).

In the construction of legacies the *proper meaning of the words* must not be departed from, unless there are sound reasons for believing that the testator understood them in another sense (8), e.g., when his disposition would otherwise involve a contradiction (9) or be invalid (10).

(1) *L. 64, ff. de legat. 1*; *L. 70, L. 71, ff. de her. inst.*

(2) *L. 11, § 7, ff. de legat. 3.*

(3) *L. 1, § 6, ff. de legat. 3.*

(4) § 4, *Inst. de legat.*; *L. 14, § ult. ff. de legat. 3.*

(5) § 10, *Inst. de legat.*

(6) *L. 34, § 7, ff. de legat. 1.*

(7) *L. 39, §§ 8-10, ff. de legat. 1.*

(8) *L. 96, ff. de legat. 3.*

(9) *L. 15, ff. de aur. & arg. leg.*

(10) *L. 50, § 5, ff. de legat. 3.*

The words must always be construed so as to give effect to the disposition (1). When the *amount* is doubtful the *smallest* amount must be taken (2). A general legacy of goods made of a *certain material* includes also such things as are not entirely composed of this material, but which contain some other matter as accessory, e.g., a legacy of tortoise-shell boxes includes those with gold or silver hinges (3). When a general legacy is followed by an *enumeration* of particular species, the legacy is not limited to the species enumerated, unless some other object for this limitation can be clearly gathered (4). A general legacy does not include things which, although they fall under the principal species, have been specifically bequeathed to other persons (5). If a testator has enjoined two things which are contradictory to each other, and has remained of the same intention in both cases, or when it cannot be distinguished which disposition he intended to remain and which he has revoked, the one disposition mutually annuls the other, and neither of them takes effect (6). A legacy of a *piece of land with all its appurtenances* includes also all the movables used for its cultivation (7). The legacy of a *country seat entirely furnished* includes not only everything that serves for the cultivation of the lands, but also household goods for furnishing the rooms, and making

(1) L. 109, ff. de legat. 1.

(2) L. 9, ff. de Reg. Jur. ; L. 43, § 1, ff. de legat. 2 ; L. 14, § 1, ff. de legat. 1.

(3) 100, § ult. ff. de legat. 3.

(4) L. 9, ff. de supell. leg.

(5) L. 80, ff. de Reg. Jur. ; L. 22, § 11, ff. de pecul. leg.

(6) L. 8, ff. de Reg. Jur.

(7) t. t. ff. de instr. vel instr. leg.



them habitable (1). A legacy of things which are to be found at a certain place comprehends such things as are destined to remain there, and not those which are accidentally there (2). A legacy of *plate* includes all the silver used at table, such as dishes, plates, spoons, forks, knives, bowls, salt-cellars, candlesticks, chafing-dishes, etc., but no other plate, such as silver chandeliers, sconces, little statues, etc. (3). A legacy of *clothes* includes everything which serves for dress, both outer garments and underclothing, boots, and all that belongs to the covering of the head, but not that which serves only for ornament (4). A legacy of *household goods* includes everything necessary to furnish a house for the ordinary use of a family, but not plate or valuables which serve only for ornament (5). There are also *yearly*, *monthly*, and *weekly* legacies, which have this peculiarity, that a legacy which is to be paid yearly, for example, is considered as due from the first day of the year, and therefore, should the legatee die within the year, it passes to his heir (6). From the moment of the testator's death *legatees acquire a vested right, and legacies take effect* (7) in so far as they are not postponed by any condition, in which case they only take effect from the day that the condition is fulfilled (8).

(1) *L. 12, §§ 27, 28, ff. de instr. vel instr. leg.*

(2) *L. 78, § 7, ff. de legat. 3.*

(3) *L. 19, § 8, ff. de aur. & arg. leg.*

(4) *L. 19, seqq. ff. de aur. & arg. leg.*

(5) *t. t. ff. de supell. leg.*

(6) *L. 4, ff. de ann. legat. L. 12, § 1, ff. quand. dies legat. ; De Groot, Intro. 2 B. 23 D. § 14.*

(7) *L. 5, pr. & § 1, ff. quand. dies legat. ; L. un. § 5, C. de Caduc. toll.*

(8) *L. 5, § 2, ff. quand. dies legat. ; L. 104, § 1, ff. de legat. 1.*

When a certain time has been annexed the effect is that, although the right to the legacy vests in the legatee on the death of the testator, the payment is postponed until that time (1). When the time annexed is uncertain, because it is uncertain whether it will ever arrive or when it will arrive, it is held to be a condition (2), unless the time is annexed not to the disposition itself but to the payment; in which latter case, should the legatee die after the testator, but before the time for the payment of the legacy has arrived, he nevertheless transmits the right to the legacy to his heirs (3).

The legatee has three kinds of actions for the payment of his legacy :

1st. A personal action, by virtue of the will (4), against the heir or such other person as is charged with the payment of the legacy ; or also against the executor if he has been appointed by the deceased ; and with such increase or decrease as the legacy has undergone, unless the heir himself is to blame for the decrease (5).

2nd. An action to recover the thing bequeathed against every possessor thereof (6).

3rd. An hypothecary action, founded on the tacit mortgage which the law has given to legatees on all the property comprised in the inheritance (7).

(1) In law this is called *Dies cedit, sed nondum venit*, L. 5, § 1 ; L. 21, ff. *quand. dies legat.*

(2) *d. L. 21.*

(3) L. 26, § 1, ff. *cod. J. Averanius, Interpr. Jur. Lib. 2, Cap. 16, & Lib. 4, Cap. 5.*

(4) § 5, *Inst. de oblig. quæ quasi ex contr.*

(5) L. 16, ff. *de legat. 3* ; L. 24, §§ 2-4, ff. *de legat. 1* ; L. 10, L. 39, ff. *de legat. 2.*

(6) L. 64, ff. *de furt.* ; § 2, *Inst. de legat.*

(7) L. 1, C. *comm. de legat.*

Among the Romans, the deduction of the *falcidian portion*, or a fourth part of the estate, was introduced for the benefit of the heir, whenever more than three-fourths of the estate was bequeathed to legatees (1); but this deduction is not allowed by our law unless the heir has adiated the estate under *benefit of inventory* (2).

## SECTION X.

## Executors.

In order to render the execution of a last will more certain, one or more persons are usually charged with such execution, who are called *executors*; for which purpose all persons who may legally be nominated as administrators of other persons' affairs may be appointed; even women (3), although they are otherwise prohibited from being guardians (4). They are appointed by will, codicil or by a special instrument (5). They may decline to accept the office, wherein they differ from guardians. Their duties consist in sealing up the property in the house of the deceased; in providing for the funeral; in executing a proper statement and inventory; in liquidating the estate; in calling in debts; in turning the property into money; in carrying out and giving full effect to the last will of the deceased, both by payment of the legacies and by giving full effect to the other dispositions; in rendering an account; in handing over the balance of the

(1) *t. t. Inst. & ff. ad Leg. Falc.*; J. Voorda, *Comment. ad Leg. Falc.* (Harl. 1730).

(2) Sande, *Decis. Fris. Lib. 4, tit. 12, def. 1*; Voet, *ad tit. ff. de iur. delib. n. 22 & 27*.

(3) *L. 15, pr. ff. de alim. & cibar. legat.*

(4) *Vide supra, p. 33.*

(5) *Ordonn. op 't Zegel van 1794, Art. 53.*

estate to the heir or to the persons who are entitled to have the control thereof, and who are called *administrators* (1). As compensation for their trouble they are entitled to charge the fortieth penning (2½ per cent.) on the receipts, and the eightieth penning (1¼ per cent.) on disbursements; on cash found in the estate and on the proceeds arising from the calling in of principal, one per cent., and a reasonable allowance for work and labour done in the management of the estate (2).

No one legally acquires an inheritance without an acceptance, i.e. by acting as heir and by committing *actes hereditaires* (3), since every one is at liberty to accept (*adiate*) or disclaim (*repudiate*) an inheritance. If, however, the person appointed heir dies before he has adiated, or even before he received notice of the appointment as heir, this right of acceptance is transmitted to his heirs (4).

Since an heir who has once adiated the inheritance cannot afterwards withdraw from it (5), and by adiation becomes tacitly liable for all the debts and charges of the estate, even though they may exceed its value (6), the law has introduced two measures for the protection of the heir.

1st. Before declaring his acceptance or disclaimer he may execute a *deed of deliberation*, or, as it is also

Adiation or ,  
repudiation.

Deed of Deliberation.

(1) Lybregts, *Red. Vert. over 't Not. Ambt.* 1 D. 30 *Cap.*

(2) Lybregts, *d. l. n.* 61, & 2 D. *Bijl. Z.* where an important decision, of July 28, 1725, of the Supreme Court on this point is to be found.

(3) *t. t. ff. de acq. vel om. her.*

(4) Loenius, *Decis. & Observ. Cas.* 56.

(5) *L. 4, C. de repud. vel. abst. hered.*

(6) Voet, *ad tit. ff. de acq. vel om. her. n.* 18 & 19.



called, *deed of non-prejudice* (1); the only effect of which is that no act committed in investigating the condition of the estate can be construed as an acceptance, unless these acts are of such a nature that the estate does not remain in its entirety, e.g., if, after the execution of such a deed, payments are made. For the rest, this period of deliberation lasts only so long as the creditors will wait, as they have, in fact, the right of compelling the heir to accept or repudiate the inheritance.

Benefit of  
inventory.

2nd. If after the execution of the deed of deliberation and the subsequent investigation into the condition of the estate, the doubt still remains as to the solvency of the estate, application may be made to the *High Court of Justice* (2) for *Letters of benefit of inventory* (3), by which the heir is allowed to accept a doubtful estate and to draw up the schedules thereof without becoming liable to the creditors and legatees

(1) Lybregts, *Red. Vert. over 't Not. Ambt.* 2 D. Cap. 7, who, however, like many other writers, confounds that which is known in our Practice as the *Deed of deliberation* with the *Jus deliberandi* of the Romans, which both in its nature and consequences differs considerably from the former, and as such is not in use in our law.

(2) This court now occupies in this respect the place of the former Supreme Court; *Instr. H. R. Art.* 23; *Public.* 30 Sept. 1795, No. 2, *Art.* 3.

(3) Since the expenses connected with a writ of benefit of inventory are very great, on account of the exorbitant charges which the *deurwaaders* allow themselves, the practice has been introduced in Amsterdam of applying to the *schepenen* that the *committee of executors may be changed into a committee of curators*, which has the same effect as a confirmed writ of benefit of inventory. The invention was certainly ingenious; but whether it is quite agreeable to the principles of law to appoint a *curator* to an estate which has not been repudiated by the heir seems to me worthy of much consideration.

except to account for the price of the property found in the estate (1). With respect to this *benefit* it should be specially noticed—

1st. That almshouses (2), governors of orphan asylums, overseers of the poor, almoners (3), and orphan chambers (4) have the privilege that, even without this benefit, they do not become liable beyond the value of the estate.

2nd. That the *Letters*, granted subject to inquiry and report (*committimus* \*), are addressed to the lower court of the town in which the deceased last dwelt (5), or, if the house of the deceased happens to be in the country, to the lower court of the nearest town (6), to which also the confirmation (*interinement* †) must be committed (7).

3rd. That if deceased sailed for the East or West Indies, and died on the voyage, the writ of *committimus* must be addressed to the judge of

(1) De Groot, *Intro.* 2 B. 21 D. §§ 8-12; Lybregts, *Red. Vert.* 2 D. chap. 8, D. D. ad tit. ff. de Jur. delib.

(2) *Resol. Holl.* 20 Dec. 1635.

(3) *Ibid.* 7 Mar. 1680.

(4) *Ibid.* 4 Dec. 1751.

\* *Committimus* is a writ addressed by either of the High Courts of Justice, on the petition of the applicant, to the judge of his domicile, or to the magistrate to whose jurisdiction the applicant is subject. It is issued in order that the judge of the domicile may collect the necessary information and report (*Kersteman's Lexicon*, p. 69).—Tr.

(5) *Ampl. Instr. van den Hove*, Art. 5; *Resol. Holl.* 10 July, 1677.

(6) *Ampl. Instr. d.* Art. 5; *Papeg.* 1 D. p. 214.

† *Interinement*, when the domiciliary judge certifies in favour of the applicant whose petition he was directed to investigate (*Kersteman's Lexicon*, p. 213).—Tr.

(7) Vide my *Verhand. over de Judic.* 2 B. 30 Cap. § 4.

the town on behalf of whose Chamber he went to sea (1).

4th. That if more than *six weeks* have elapsed since the decease, it is customary to pray for this benefit, together with a clause of Relief \* against the lapse of time, so far as is necessary (2).

5th. That when this Writ has been granted, the process-servers or *deurwaarders* † must give notice to the creditors and legatees to appear on a certain day at the house of the deceased, to be present at the drawing-up of an inventory of the goods situate there, which the *deurwaarder* must do within *forty days* after the writ has been granted (3); and also to appear before the lower court, to be present at the *interinement* or confirmation of the writ. The heir must have the property appraised, after inventory thereof has been drawn up, and must give security for its value; moreover, he must liquidate the estate, and render an account.

6th. That the *interinement* or confirmation of the writ may be opposed on two grounds, viz., *a*, that the heir has already committed *actes hereditaires*; *b*, that he has acted *malâ fide* in his statement (of the value) of the estate.

(1) *Resol. Holl*, 22 Dec. 1735.

\* *Vide infra*, p. 317.—Tr.

(2) Van Alphen, *Papeg*. 1 D. p. 215, n. 13; De Haas, *Aanteek op Merula*, Lib. 4, Tit. 24, Cap. 12, § 13 (o).

† *Deurwaarders*, officers of the High Courts of Justice, so called because they opened and closed the doors of the court. They had to serve the court in all matters: to execute judgments, and to make arrests and serve summonses upon the order of the court, &c. (*Kersteman's Law Lex*. p. 98).—Tr.

(3) *Placaat of Emperor Charles*, 19 May, 1544, Art. 39.

Lastly, we must mention here that all who inherit any immovable property or movables from their relatives, namely, in the ascending or collateral line, or from strangers, have to pay a collateral succession duty, which is calculated at the *tenth* penning if one would not have been entitled *ab intestato* to the property inherited, or if the person obtaining the property is related to the testator beyond the fourth degree; at the *fifteenth* penning when husband and wife, without leaving any children by that marriage, inherit from each other; and the *twentieth* penning when parents inherit from their children, or when heirs *ab intestato* inherit from their relatives within the fourth degree: all of which is subject to an additional one tenth (1).

## SECTION XI.

The reasons for which a last will, originally valid, becomes null and void may conveniently be reduced to the following:—

1st. *Express revocation*, made by a subsequent will or by an instrument, executed in the presence of the same number of witnesses as are necessary in the case of a will, in which a person declares his desire to die *intestate* (2). If a will contains the *derogatory clause* (*clausule derogatoire*), i.e. a declaration that a subsequent will shall not be valid unless certain words are repeated in it, e.g., *Heaven be my patrimony*;

(1) *Ordonn. op't Collatteraal*, 1 May, 1723; *Publ. Holl.* 22 Dec. 1733, and 29 June, 1743; also several *Resolutiën*, for the decision of cases which may arise, in the sixth and following volumes of the *Gr. Plac. Boek*.

(2) De Groot, *Intro.* 2 B. 24 D. § 16; Voet, *ad tit. ff. de inj. rupt. irr.* n. 1.



such a subsequent will is valid if either these words are expressly repeated, or if it merely contains a general revocation of former wills, even although they contain a derogatory clause (1).

2nd. The execution of a subsequent perfect will, although it does not contain an express revocation of the former will, destroys the latter: unless it appears to have been the intention of the deceased that the former will should remain in force, either wholly or in part (2).

3rd. The loosening of the seals and threads of a closed will is held to be a revocation (3). In an open will, however, it is not sufficient to make erasures and alterations in the *grosse*,\* if the original *minute* is left entire and intact (4).

4th. If the person appointed heir dies before the testator, or refuses, or is unable to become heir (5)—in which case, however, the legacies have to be paid, especially when the will contains a declaration that if it is invalid as a testament it shall at least be valid as a codicil, which usually is called the *codicillary clause* (*clausule codicillaire*) (6).

(1) Bynkershoek, *Quæst. Jur. Priv. Lib. 3, Cap. 6 & 7, and Lib. 2, Cap. 16, n. 6.*

(2) De Groot, *Intro. 2 B. 24 D. § 9*; Voet, *ad tit. ff. de inj. rupt. n. 8*; V. D. Keessel, *Thes. 329.*

(3) *Holl. Cons. 6 D. 2 St. Cons. 13-16*; Stockmans, *Decis. 13.*

\* *Grosse* = a copy of an instrument, without abbreviations, and taken word for word from the minute or original instrument. Thus a *grosse* is made of all notarial deeds, and given to the persons interested (*Kersteman, p. 170*).—Tr.

(4) V. D. Keessel, *Thes. 330*; vide also my *Verzam. van Gewijsden, 1 D. Cas. 13.*

(5) *L. 181, ff. de Reg. Jur.*

(6) Voet, *ad tit. ff. de inj. rupt. n. 14.*

5th. If an unmarried person makes a will, and afterwards marries and begets legitimate children, the birth of these children annuls the will (1).

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## CHAPTER X.

### ON INTESTATE SUCCESSION.

#### SECTION I.

INTESTATE SUCCESSION—which takes place when the deceased has made no will at all, or when his will, for any of the above-mentioned reasons (2), has become void (3)—has since ancient times been of two kinds in Holland, namely, either according to *Aasdomsch* or *Schependomsch* law. The rule of the first was, *the nearest in blood succeeds to the property*; the fundamental rule of the second was, *the property must go back from whence it came* (4). The State of Holland in 1580 (5) framed a law of intestate succession out of these two systems, which was commonly known by the name of the *New Schependomsch*, or *South Holland Law of Intestate Succession*; but as those of the *northern quarter*, being accustomed to the *Aasdomsch* law, could not reconcile themselves to this new law, another placaat was passed in 1599 (6)

(1) Voet, *ad tit. ff. de inoff. test. & ad tit. ff. de lib. & posth. Thes.*; V. D. Keessel, *Thes.* 306.

(2) Chap. 9, § 11.

(3) *L.* 64, *ff. de verb. sign.*

(4) De Groot, *Intro.* 2 B. 28 D. § 1, *et seqq.*; H. V. D. Vorm, *Versterfrecht*, parts 7 & 9.

(5) *Pol. Ord.* 1 April, 1580, Art. 19–28.

(6) *Plac. Holl. on succession ab intestato*, 18 Dec. 1599.

which regulated the law of intestate succession in the following towns: *Haarlem, Leyden, Amsterdam, Alkmaar, Hoorn, Enkhuizen, Edam, Woerden, Naarden, Monnikendam, Medenblik, Muyden, and Purmerend*; also in the other towns, seignories, islands, villages, and hamlets situated within the jurisdiction of the Dike-Reeve of *Rhineland*, the *Land of Woerden*, both that situated in the east and north of *Rhineland*, and that situated in *Holland* and *West Friesland*, with the exception of *Waddingsveen, Boskoop, Reewijk, Sluipwijk, Bloemendaal, and Middelburg*, and their dependencies on the east and west side of the *Gouwe*. This law is called the *New Aasdomsch* or the *North Holland and West Friesland Law of Intestate Succession*.

## SECTION II.

Intestate suc-  
cession in  
North and  
South Holland.

Let us enumerate shortly the most important points in both these laws of intestate succession, with their differences, and let us reduce them to rules.

1st. Children, grandchildren, and more remote descendants succeed to their parents' estate before all other persons. If all the children are of the same degree of relationship, they take equally *per capita*; but if they step into the place of predeceased children by representation, they take *per stirpes* (1).

2nd. On failure of children and more remote descendants, the inheritance of the deceased goes to his father and mother, if both are still alive (2).

3rd. If only one of the parents, whether father or mother, is alive, which is called "*the bed being torn*

(1) *Pol. Ord. Art. 20; Plac. 1599, Art. 1.*

(2) *Ibid. Art. 21; Plac. Art. 2.*

*asunder*," then, according to the *law of South Holland*, all the property of the deceased goes in equal shares to his brothers and sisters (1), whether of the whole blood or half-brothers and sisters (2), in equal shares, and to their children and grandchildren by representation; provided that that parent is dead through whom the brothers and sisters of the half blood, their children and grandchildren, are related to the deceased: because in *South Holland*, if the "*bed has been torn asunder*," the surviving parent and all the collateral relations related to the deceased only through such parent, are excluded (3). But according to the *law of North Holland*, the surviving parent, with the brothers and sisters of the deceased of the whole or half blood, and their children and grandchildren by representation, succeed together to the whole inheritance: to wit, the surviving parent takes one half, the brothers and sisters, their children and grandchildren, take the other half. This must be understood of brothers and sisters of the half blood, their children and grandchildren, who are related to the deceased through the parent who is dead. If no brother or sister of the whole or half blood is alive the surviving parent takes the whole, although there are children or grandchildren of predeceased brothers and sisters (4).

4th. On failure of both father and mother, all the property of the deceased goes to the brothers and sisters of the whole or half blood, their children and grandchildren, by representation and *per stirpes* (5). The

(1) *Ibid. Art. 22.*

(2) *Interpr. Holl. 13 May, 1594.*

(3) *Pol. Ord. Art. 26; Interpr. 13 May, 1594.*

(4) *Plac. of 1599, Art. 3.*

(5) *Pol. Ord. Art. 22; Plac. Art. 4.*



half-brothers and sisters, however, take with the *half hand* (1): i.e., the estate is divided into two; the one half the brothers and sisters of the whole blood share with the half-brothers and sisters on the father's side, and the other half they share with the half-brothers and sisters on the mother's side. If there are only half-brothers and sisters on one side, the brothers and sisters of the whole blood first take one half of the estate, and the other half they share with the half-brothers and sisters on the father's or mother's side (2).

5th. On failure also of brothers and sisters of the whole blood, their children and grandchildren, and there are half-brothers and sisters, their children and grandchildren on both sides surviving, the one half of the estate goes to the half-brothers and sisters on the father's side and their children and grandchildren, by representation and *per stirpes*; and the other half goes to the half-brothers and sisters on the mother's side and their children and grandchildren, as before (3).

6th. If all the half-brothers and sisters, their children and grandchildren, are related to the deceased on one side only, they only take one half of the estate in *South Holland*, and the other half goes to the next of kin (*magen*) and blood relations on the other side (4). But in *North Holland* the half-brothers and sisters, their children and grandchildren, related on the one side inherit the whole estate of the deceased: unless a grandfather, grandmother, or more remote ascendant (related to the deceased on the other side) be alive, in

(1) *Pol. Ord. Art. 23.*

(2) *Interpr. 13 May, 1594; Plac. Art. 4.*

(3) *Pol. Ord. Art. 23 & 27; Plac. Art. 5.*

(4) *Pol. Ord. Art. 27.*

which case the half-brothers and sisters, their children and grandchildren, take only one half, and the nearest ascendant or ascendants take the other half, *per capita* (1).

7th. By the law of intestate succession in *South Holland*, although the persons who succeed to the inheritance are all related to the deceased in the same degree, they nevertheless only take *per stirpes*, and not *per capita* (2); but by the law of intestate succession of *North Holland* they take in that case *per capita*, and not *per stirpes* (3).

8th. On failure of all the above-mentioned persons, all the property of the deceased goes, according to the law of *South Holland*, to the nearest descendants of the grandchildren of brothers and sisters, *per capita* (4); after these, to the grandfathers and grandmothers on both sides, if both are alive; but if one of them, whether grandfather or grandmother, be dead, his or her share goes to the nearest relations on the side (5) of the deceased grandparent, namely, to the uncles and aunts of the deceased and their children in the first degree, by representation; and in such a way that the estate is divided into two parts, the one half going to the father's, and the other half to the mother's side, the blood relations of the half bed only sharing with the *half hand* (6). If there are no uncles or aunts, the estate goes to their children in the first degree,

(1) *Plac. Art. 6.*

(2) *Pol. Ord. Art. 28.*

(3) *Plac. Art. 11 & 12.*

(4) *Pol. Ord. Art. 24 & 28; Interpr. 13 May, 1594.*

(5) *Pol. Ord. Art. 25 & 26; Interpr. 1594.*

(6) *Pol. Ord. Art. 23, 24, & 27; Interpr. 1594.*

*per stirpes*, and, on failure of these also, to the nearest collateral relatives, *per capita* (1).

9th. But by the law of succession of *North Holland*, on failure of all the persons enumerated in *subsections 1 to 7*, the inheritance goes first to the nearest ascendants, *per capita*, even although on the one side both grandparents may be living, and on the other side only one of them (2); after these, to the nearest descendants of the grandchildren of brothers and sisters, *per capita*, whether descended from brothers and sisters of the whole or the half blood (3); next, to uncles and aunts and their children of the first degree, by representation (4); on failure of uncles and aunts, to their children in the first degree, together with great uncles and aunts, *per capita*; and after all these persons, to the relatives related in the next degree, also *per capita*, and to the exclusion of all who are related to the deceased in a more remote degree (5).

### SECTION III.

Special points  
in intestate  
succession.

With respect to the subject of *intestacy* the following special points deserve still to be mentioned:—

1st. That in intestate succession, *movable* property is governed by the law of the place where the house of the deceased is situated (6), unless a person happened to die in any other place than his domicile (7);

(1) *Pol. Ord. Art. 28.*

(2) *Plac. of 1599, Art. 7.*

(3) *Plac. Art. 8.*

(4) *Ibid. Art. 9.*

(5) *Plac. Art. 10.*

(6) *De Groot, Intro. 2 B. 26 D. § 12, n. 4.*

(7) *Bynkershoek, Qucest. Jur. Priv. Lib. 1, Cap. 16.*

but that *immovable* property is governed by the law of the place where it is situated (*lex loci*) (1).

2nd. That children, or grandchildren by representation, becoming jointly the heirs of their parents or grandparents on intestacy, must bring into hotch-pot (collation) with their brothers and sisters, in order that the latter may be placed on an equal footing as to their shares of the inheritance, everything which each has already received, beyond and above the others, from the deceased parents during their lifetime, either on marriage or for carrying on any trade or business (2).

3rd. That *husband* and wife cannot be each other's heirs on intestacy, except by the law of intestate succession of *North Holland*, when no relations whatsoever of the deceased are to be found (3).

4th. That illegitimate children succeed to the mother on intestacy, as she cannot make a bastard (4). But whether they can also succeed to their mother's relatives is a question in which we are most inclined to agree with those who answer in the *negative* (5).

5th. That the children begotten in lawful wedlock by bastards are their heirs on intestacy; and on

(1) De Groot, *Intro.* 2 B. 26 D. § 12, n. 5; and 2 B. 29 D. § 3; Voet, *ad tit. ff. ad SCt. Trebell.* n. 34.

(2) D. D. *ad tit. ff. de collat.*; Pol. Ord. Art. 29; S. van Leeuwen, R. H. R. 3 B. 16 D.; Lybregts, *Red. Vert. over 't Not. Ambt.* 1 D. Cap. 14.

(3) De Groot, *Intro.* 2 B. 30 D. § 2; Loenius, *Decis. Cas.* 108; Bynkershoek, *Quæst. Jur. Priv. Lib.* 3, Cap. 12; V. D. Vorm, *Versterf-regt*, pp. 195–208 (Edit. Blondeel).

(4) De Groot, *Intro.* 2 B. 27 D. § 14.

(5) Bynkershoek, *Quæst. Jur. Priv. Lib.* 3, Cap. 11; V. D. Vorm, *Versterf-regt*, pp. 209–236; V. D. Keessel, *Thes.* 342–345.



failure of children, the relatives on the mother's side succeed *ab intestato*, without the State having any claim thereto (1).

6th. That on any one dying intestate, without leaving any next of kin, the estate escheats to the State (2). This must be understood in a broad sense; because if there are next of kin, even beyond the tenth degree of relationship, they succeed to the inheritance (3). So also when the next of kin on one side fail, that portion does not escheat to the State, but accrues to the share of the next of kin on the other side (4).

## CHAPTER XI.

### ON SERVITUDES.

#### SECTION I.

Servitudes in  
general.

THE third sort of *real rights* is the right of *servitude*, by which one tenement, whether land or a house, is obliged to serve a neighbouring tenement, or by which a thing is obliged to serve a person. Servitudes are thus *real* or *personal* (5). The real servitudes are *rural* or *urban servitudes* (*prædia rustica et urbana*); the *personal* are *usufruct*, *use*, the right of *levying quit-rents*, *tithes*, *census*, etc. Let us shortly notice all these.

(1) De Groot, *Intro.* 2 B. 31 D.; V. D. Vorm, *Versterf-regt*, pp. 237-241; V. D. Keessel, *Thes.* 368.

(2) *t. t. C. de bon. vacant.*

(3) Leonius, *Cas.* 122; Voet, *ad tit. ff. ad Sct. Trebell. n.* 22.

(4) V. D. Keessel, *Thes.* 366 & 367.

(5) *L. 1, ff. de servitat.*

## SECTION II.

Under rural servitudes (*prædia rustica*) (1) are Rural servitudes.  
classified:—

*a*, The right of going on foot over the land of another (2); *b*, the right of riding on horseback over the land of another (3); *c*, the right of driving cattle over a person's land (4); *d*, the right of driving with horses and waggons over a person's land (5)—whenever any land does not abut on the highway or neighbouring road, a road *ex necessitate* is granted by the lower court (6); *e*, the right of drawing water from another's well or cistern (7); *f*, the right of leading water away from another person's water (8); *g*, the right to drain or discharge the water from one's own land on to that of another; *h*, the right of traversing another's water; *i*, the right of watering one's cattle at another's water (9).

## SECTION III.

*Urban servitudes* (10) may be illustrated by the Urban servitudes.  
following examples: *a*, The right of building on the

- (1) *Servitutes prædiorum rusticorum.*
- (2) *Pr. Inst. de serv. præd.; L. 1, ff. de serv. præd. rust.*
- (3) *L. 7, L. 12, ff. eod.*
- (4) *L. 7, L. 12, L. 13, ff. eod.*
- (5) *L. 1, L. 7, L. 8, L. 23, ff. eod.*
- (6) *De Groot, Intro. 2 B. 35 D. §§ 7-12; Voet, ad tit. ff. de serv. præd. rust. n. 4.*
- (7) *L. 2, § 1, L. 5, § 1, L. 9, ff. eod.*
- (8) *L. 1, pr. L. 9, L. 15, ff. eod.*
- (9) *L. 1, § 1, ff. eod.*
- (10) *Servitutes prædiorum urbanorum.*

wall of another (1). No one may build upon more than one-half (in width) of a party-wall (2), and no ovens or water-closets may be annexed to the wall (3). A party-wall must be maintained at the common expense (4). *b*, The right to fix a beam or cramp in another's building (5); *c*, the right of allowing one's rain-water to drip on another's ground (6); *d*, the right of catching up the rain-water coming from another's tenement (7); *e*, the right of preventing my neighbour from raising his structure any higher (8); *f*, the right of preventing my neighbour from obstructing my view (9); *g*, the right of having a window opening out on another's ground (10); *h*, the right of having a drain on another's ground (11); *i*, the right of preventing my neighbour from having a look-out over my tenement (12). On these and other urban servitudes the local statutes on the divisions of tenements (*erfscheidingen*) which are met with in most of the towns, should chiefly be consulted.

(1) *L. 33, ff. de serv. præd. urb.*

(2) De Groot, *Int. 2 B. 34 D. § 4*; Voet, *ad tit. ff. de serv. præd. urb. n. 17.*

(3) *Regtsg. Observ. 3 D. Obs. 51.*

(4) De Groot, *Int. 2 B. 34 D. § 6.*

(5) *L. 2, ff. de serv. præd. urb.*

(6) *d. L. 2.*

(7) *d. L. 2.*

(8) *d. L. 2, Regtsg. Observ. 3 D. Obs. 53.*

(9) *L. 2, L. 12, L. 17, ff. de serv. præd. urb.*

(10) Voet, *ad tit. ff. de serv. præd. urb. n. 9.*

(11) *L. 7, ff. de servit.*

(12) *L. 8, C. de serv. & aqua.*

## SECTION IV.

*Real servitudes* both of land and of houses are ac- How acquired  
quired by agreement and mutual consent (1); by last and lost.  
will (2); by prescription, even of a year and a day,  
according to the local statutes of several places (3).

They are *lost* when the ownership of the servient  
and dominant tenement is united in the same person  
(merger) (4), because a person has the use of his own  
property by reason of ownership and not of servitude  
(5); by surrendering the servitude (6); by allowing  
something which is contrary to the nature of the  
servitude (7); by destruction of either the servient or  
dominant tenement (8); when the right of the grantor  
ceases (9); if a person does not use the servitude for  
one-third of a century, although he has opportunities  
to do so (10).

## SECTION V.

Of the *personal servitudes* the principal and the first Usufruct.  
is the right of *usufruct*, i.e. the right of taking the  
fruits of another's property in such a manner that the  
property is not deteriorated thereby (11). The modes

(1) § 4, *Inst. de serv. præd.*

(2) *d.* § 4.

(3) De Groot, *Int.* 2 B. 36 D. § 5; *Regts. Obs.* 3 D. Obs. 50.

(4) L. 1, ff. *quemadm. serv. amitt.*

(5) According to the maxim, *res sua nemini servit.* L. 26, ff. *de serv. præd. urb.*

(6) L. 35, ff. *de Reg. Jur.*

(7) L. 8, ff. *quemadm. serv. amit.*

(8) L. 14, ff. *eod.*

(9) L. 11, § 1, ff. *eod.*

(10) L. 7, L. 10, § 1, L. 11, L. 18, ff. *eod.*; Voet, *ad d. t. n.* 7.

(11) L. 1, ff. *de usufr.*



of acquiring and losing this right are substantially the same as those just mentioned; this only must be observed, that, as this kind of servitude is attached to a person and not to a thing, the usufruct ceases on the death of the usufructuary (1), whose heirs therefore can only enjoy the fruits up to that time and not longer (2). As this right is limited to the enjoyment of the fruits, the usufructuary must take good care that he uses the property without deteriorating it, so that, when the usufruct ceases, the property may revert to the owner in a good condition; and for this he is even bound to give security (3); he may therefore not alienate or encumber the property subject to the usufruct (4), but on the contrary, is obliged to keep it in a good condition to the extent of the ordinary expenses of maintenance (5).

## SECTION VI.

Other personal  
servitudes.

Other examples of *personal servitudes* are—

1st. The right of *use*, which is not so large as usufruct, and does not extend to the enjoyment of all kinds of fruits (6).

2nd. The right of *inhabiting* a house (7).

3rd. The right of enjoying an annual quit-rent (*erfpagt*) upon another's immovable property (8).

4th. The right of levying *tithes*, which consist in the

(1) § 3, *Inst. de usufr.*

(2) *L. 26, ff. de usufr.*

(3) *t. t. ff. usufr. quemadm. cav.*

(4) *L. 13, § 4, ff. de usufr.*

(5) De Groot, *Int. 2 B. 39 D. § 6; Regts. Obs. 3 D. Obs. 60.*

(6) *t. t. Inst. & ff. de usu & habitat.*

(7) § 5, *Inst. de usu & habitat.*

(8) De Groot, *Int. 2 B. 40 D.*

eleventh part of certain fruits, whether of corn—which is called *large* or *coarse* tithes—or of other crops, called *small tithes*, or of young cattle, called *crying tithes* (1).

5th. The right of claiming *cynsen* and *tynsen* (2).\*

## CHAPTER XII.

### ON PLEDGE OR MORTGAGE.

#### SECTION I.

THE *fourth* and last kind of *real rights*, is the right of *pledge*, by which some property is specially bound to a creditor as further security for his debt. The right of pledge is either given by the law, which is called a *legal* (or *tacit*) *mortgage*, or it is established by agreement, and is then called a *conventional mortgage*.

#### SECTION II.

The law tacitly, without any agreement to that effect being necessary, gives a right of *legal* or *tacit mortgage*: *a.* To persons entitled to *cynsen*, *tynsen*,\* or *oud-eigen*,† on the property upon which the

(1) Ibid. *Intro.* 2 B. 45 D.; V. D. Schelling, *Holl. Tiendrecht*, 2 vols. in 8vo.

(2) Ibid. 2 B. 45 D.; S. van Leeuwen, *Cens. For.* P. 1, Lib. 2, Cap. 17.

\* *Cyns*, or *census*, is a right to a perpetual annuity, reserved on the transfer of property. *Thyns* or *tyns* is a lesser kind of census (*minor census*) (*Cens. For.* 1, 2, 17, 72).—TR.

† *Oud-eigen*. A common name for census (*Cens. For.* 1, 2, 17, 72).—TR.

cyns, etc., is levied (1). *b.* To the Dike-board or Reeve, for the expenses of dikes, dams, mills, sluices, reservoirs, and the like (2). *c.* To masons, carpenters and other labourers, for labour or materials supplied for the *repair* (but not for ornament or improvement) [*melioratie*] of a building (3). By the local statutes of several towns this right is limited to the repair of the last *two* or *three* years (4). *d.* To the State, on the property of those who have had any control or receipt of the revenue (5). In other cases, if the State is one of the creditors of an insolvent estate, it has no better right than other creditors (6); nor with respect to the levying of fines inflicted in favour of the State (7). *e.* To minors, on the property of their guardians, to the extent of the loss suffered by their guardians' maladministration (8). *f.* To the lessors of houses or lands, on all the movable property brought thither by the lessee, and also on the fruits which grow upon the land (9). *g.* To bleachers of linen and clothes, for their charges of

(1) De Groot, *Int.* 2 B. 48 D. § 11; Voet, *ad tit. ff. in quib. caus. pign.* n. 27.

(2) *Ibid.* d. l. § 12; Voet, *ad t. n.* 31.

(3) Voet, *ad d. t. n.* 28.

(4) See the local statutes of *Haarlem, Alkmaar, Purmerend, den Hage, Amsterdam, Rotterdam* and *Monnikendam*, quoted by Prof. V. D. Keessel, *Thes.* 467.

(5) Boel on Loenius, *Decis. Cas.* 17, p. 108-201; *Gener. Plac.* 22 July, 1749, *Art.* 26.

(6) *Resol. Holl.* 25 Feb. 1678, in *Gr. Pl. Boek*, 3 D. p. 591.

(7) Groenewegen, *de L. L. abrog. ad tit. C. de poen. fiscal*; Voet, *ad tit. ff. in quib. caus. pign.* n. 9.

(8) *L.* 20, *C. de adm. tut*; Lybregts, *Red. Vert.* 1 D. 30 C. n. 64 *et seq.*

(9) De Groot, *Intro.* 2 B. 48 D. § 17; *Regts. Obs.* 1 D. *Obs.* 72; V. D. Keessel, *Thes.* 423.

washing (1). *h.* To towns and villages, on the property of their tax-collectors (2); also to churches, on the property of the administrators of the church property (3). *i.* To the master of a ship, on the ship and merchandise, as security for the freight (4). *k.* To the merchant, on the ship belonging to the master, for compensation for his goods sold in case of need by the master (5). *l.* To a factor or commission agent (*commissionair*), on the goods sent him on commission for advances made on those goods by him to the owner (6). *m.* To a woman married out of community of goods, on the property of the husband, for restitution of the property brought by her at the time of or acquired during the marriage (7). *n.* To legatees, on the property in the inheritance left by the deceased, as security for the payment of the legacies bequeathed (8).

### SECTION III.

*Conventional mortgages*, which do not arise tacitly by operation of law, but only in consequence of an express agreement, relate either to *movable* or *immovable* property. In order that a pledge of movables may be

Conventional mortgage.

(1) *Plac. Holl.* 23 Jan. 1614, and 9 May, 1732.

(2) *Resol. Holl.* 19 July, 1625, and 24 Feb. 1679; Loenius, *Decis. Cas.* 69.

(3) *Decis. & Resol. v. d. Hove van Holl.* n. 355.

(4) De Groot, *Intro.* 2 B. 48 D. § 19; Roccus, *van Schepen en Vragtgelden*, p. 117, *seqq.*

(5) *Ibid. d. l.* § 20; Verwer, *Nederl. Zceregten*, p. 28 *seqq.*

(6) *Ibid. d. l.* § 21; Neostadius, *Decis. Cur. Holl.* 45, *Handv. van Amsterdam*, 2 D. p. 539.

(7) *L. un.* § 1 & 15, *C. de rei uxor. act.*; *L.* 12, § 1, *C. qui pot. in pign.*; § 29, *Inst. de action.*

(8) Voet, *ad tit. ff. in quib. caus. pign. n.* 21.



valid, not only as against the debtor himself, but also as against third parties, delivery of the property to the creditor to whom it is pledged is necessary (1). This is called *pand ter minne*; and all kinds of movable property may be used for this purpose, except such as are usually pawned at a pawnbroker's (2). The mortgage of *immovable* property—under which is included redeemable and life annuities, mortgage-bonds (*schepenkennissen* \*), *kustingbrieven*, † or yearly annuities—is not valid unless it is executed before the court, and payment of the fortieth penning (2½ per cent.), with the addition of one-tenth, is made (3).

*Conventional mortgages* are also divided into *general* and *special* mortgages. A *general* mortgage is a mortgage on all the property of the debtor, and is not valid unless the payment of the fortieth penning (2½ per cent.) be made to the State (4); it may therefore be executed before the court, before a notary and witnesses, or even by an underhand instrument (*i.e.*, non-notarial). A *special* mortgage, in so far as it relates to immovable property, requires, besides the payment of this duty, to be executed before the court (5).

(1) De Groot, *Intro.* 2 B. 48 D. § 25–29; *Regtsg. Obs.* 3 D. *Obs.* 68; Voet, *ad tit. ff. de pign. & hyp. n.* 12.

(2) *Handv. van Amsterdam*, 2 D. p. 681, and the statutes on pawnbrokers of various towns.

\* So called because they were passed before *schepenen*.—Tr.

† A *kustingbrief* is a special mortgage of immovable property for the residue of the purchase-money, for which a bond is passed at the transfer of the property.—Tr.

(3) *Plac.* 9 May 1529; *Pol. Ord. Art.* 35; *Waarschouw*, 5 Feb. 1665; *Ordon. op den 40 pen.* 9 May 1744, *Art.* 2, 16, 17, 18.

(4) *Waarschouw*, 5 Feb. 1665.

(5) Vide the *Plac. Waarschouw & Ordon.* just mentioned.

## SECTION IV.

The result of a pledge or mortgage is the *right of preference* which springs from it; concerning which the following remarks deserve to be borne in mind: Order of ranking.

1st. If, in an insolvent estate, property is found of which another person is owner, he takes back such property without being affected in any way by the order of ranking (1).

2nd. First and foremost, the expenses of administering the estate are deducted from the proceeds thereof (2).

3rd. In the first rank of preferent debts are funeral expenses, rent of house or land, the current wages of servants, government and municipal taxes (3).

4th. The holders of *special* mortgages, legally executed, have a preferent claim on the proceeds arising from the sale of the particular property mortgaged (4); it being understood however, that the government and municipal taxes on that property which have not been paid, and the charges for the necessary repairs done to it within the last two or three years, are prior in the order of ranking (5). If there are several special mortgages executed upon the same property, that which is prior in order of time ranks first (6).

5th. Next to all these debts rank *legal* or *tacit*, and *general* mortgages; that which is prior in order of

(1) Voet, *ad tit. ff. qui pot. in pign. n.* 13; V. D. Keessel, *Thes.* 448.

(2) V. D. Keessel, *Thes.* 451.

(3) *Ibid.* 452, *seqq.*

(4) *Pol. Ord. Art.* 35.

(5) V. D. Keessel, *Thes.* 466, 467.

(6) *Ibid.* 469.

time ranking first (1). A prior tacit mortgage is preferent to a posterior special conventional mortgage (2). A *general* mortgage, executed with the payment of the fortieth penning ( $2\frac{1}{2}$  per cent.), extends to *all* the property, wherever situated (3), unless particular local statutes make any exception (4).

If there are two general mortgages, and the duty of  $2\frac{1}{2}$  per cent. has been paid on each, and the prior mortgage is executed by an underhand (non-notarial) deed, and the posterior mortgage by a notarial deed, then it is held that the posterior notarial mortgage ranks before the prior underhand mortgage (5).

6th. If a surplus still remains after payment of the *preferent* claims, then the *concurrent* creditors rank *pro ratâ*, i.e., each for the same percentage of the amount of his claim (6).

## SECTION V.

Sale of thing  
mortgaged.

If a debt is contracted upon a special mortgage of immovable property, and falls due, the creditor may not sell the mortgaged property without a previous judgment of the court, for which purpose he must have

(1) De Groot, *Intro.* 2 B. 48 D. § 35; *Regts. Observ.* 4 D. Obs. 38.

(2) *Ibid.* d. l. § 36; V. D. Keessel, *Thes.* 437.

(3) *Pol. Ordon. Art.* 35.

(4) *Handvest. van Amsterdam*, 2 D. p. 532, seq.; Mieris, *Handv. van Leyden*, p. 190. At Amsterdam this special law is also in force, that prior general mortgages rank before posterior special mortgages (*Handv. d. l.* p. 533).

(5) L. 11, C. *qui pot. in pign.*; vide my *Aanteek. op Merula's Man. van Proced.* 2 D. p. 188.

(6) Voet, *ad tit. ff. qui pot. in pign. n.* 36.

the confession of judgment (*willige condemnatie*) drawn up, if the bond was made subject to confession being signed; or he must issue a summons against the debtor for payment, and to appear to hear the mortgaged property declared bound and executable (1). When this judgment is obtained, the special mortgage is executed with all the formalities required in the case of an *onwillig Decreet* (2).\*

A judgment of the court is also necessary (3) for the sale of movables† pledged as *pand ter minne*, among which may be included government securities (4). For this reason, the creditor usually covenants in the *mortgage deeds* that, in default of payment, he shall be empowered to sell the property mortgaged. Although this covenant is valid according to law (5), yet in such a case it is most prudent before proceeding to the sale to obtain the sanction of the court.

## SECTION VI.

The right of mortgage is destroyed and ceases—

a. When the principal debt is discharged by

How the right  
of mortgage  
is lost.

(1) De Groot, *Intro.* 2 B. 48 D. § 41; Voet, *aliique D. D. ad tit. ff. de distr. pign.*

(2) Vide my *Verhand. over de Judic. Pract.* 2 D. 3 B. Chap. 6.

\* *Onwillig Decreet* is really a sale of immovable property, which takes place by way of execution upon the order of the court; or, in a more general sense, a sale of a debtor's property, commenced by the Deurwaarder upon a judgment, and afterwards consummated at the High Court.—*Kersteman*, p. 326. [Vide also Book III., Ch. I., §§ XI., XII.]—Tr.

(3) V. D. Keessel, *Thes.* 430.

† The text says "immovable property;" but see § 3.—Tr.

(4) De Groot, *d.* § 41.

(5) *L.* 4, *ff. de pign. act.*



payment, novation, set-off, release, merger, or in any other way (1).

*b.* By release of the mortgage, the debt nevertheless remaining as a concurrent one (2).

*c.* By the alienation of the mortgaged property by the debtor with the consent of the creditor (3).

*d.* By destruction of the mortgaged property (4).

*e.* By effluxion of the time limited by the agreement for the duration of the mortgage (5); and,

*f.* By prescription of thirty or forty years, provided that in the meantime no interest on the debt is paid and the prescription is not interrupted thereby (6).

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## CHAPTER XIII.

### ON THE RIGHT OF POSSESSION.

#### SECTION I.

Possession.

ALTHOUGH, properly and accurately speaking, the right of *possession* cannot be regarded as a *fifth* kind of real rights (7), yet *possession* is too important, by reason of its nature and consequences, not to be treated of separately.

*Possession* is "the actual detention of some thing,

(1) Voet, *ad tit. ff. quib. mod. pign. vel hyp. solv. n. 2.*

(2) Voet, *ad d. t. n. 5.*

(3) Ibid. 6 & 7.

(4) Ibid. 14.

(5) Ibid. 10.

(6) De Groot, *Intro. 2 B. 48 D. § 44*; V. D. Keessel, *Thes. 443.*

(7) Vide *supra*, *r. 46.*

with the intention of keeping it for oneself." Both these conditions are essential to constitute possession. Mere detention without such intention is insufficient, because, e.g., a lessee, a mandatary, a depositary, cannot in a legal sense be said to possess (1); nor can a person acquire possession by the mere intention, without actual detention (2). Both these conditions must also be wanting before a person can be said to have lost possession (3).

## SECTION II.

As illustrations of the peculiar nature and consequences of the right of possession we may mention—

Consequences  
of possession.

*a.* Possession has nothing in common with ownership (4), which can only be acquired by a lawful title, but this is not necessary in the case of possession (5), which is therefore also divided into *bonâ fide* and *malâ fide* possession (6).

No one may be put out of possession without legal process (7). Should he be ousted from possession, even upon a claim of ownership, the possession must

(1) *L. 2, C. de præfer. 30 vel 40 ann.*; *L. 9, ff. de reivind.*; *L. 1, § 20, L. 3, § 20, ff. de acq. vel am. poss.*; *L. 16, ff. de per. & comm. rei vend.*; *L. 1, § 22, de ff. de vi & vi arm.*

(2) *L. 3, § 1, ff. de acq. vel am. poss.*; *L. 10, C. de acq. vel ret poss.*

(3) *L. 8, § 27, ff. de acq. vel am. poss.*; *L. 153, in fin. ff. de Reg. Juris.*

(4) *L. 12, § 1, ff. de acq. vel am. poss.*

(5) *L. 11, C. de petit. hered.*; *L. 25, ff. de jure fisci.*

(6) De Groot, *Intro. 2 B. 2 D. §§ 9–11.*

(7) *Ibid. d. l. § 6; Regtsg. Obs. 2 D. Obs. 26.*

first be put in the same position it was, before any inquiry as to the ownership can be entered into (1).

## SECTION III.

Legal proceedings in respect of possession.

Several legal proceedings with regard to possession have been introduced into our practice:

1st. To *obtain* possession. This is termed, Writ of *Immissie* (*Mandament van Immissie*), and is almost solely and only applicable when one co-heir ousts another, who has equal rights, out of the possession of the estate (2).

2nd. To *retain* possession, and to remove all the obstructions which are opposed to us in respect thereof. This is called Writ of *Maintenue* (*Mandament van Maintenue*) (3). In order to obtain this writ it is necessary that possession should not have been obtained, *vi, clam aut precario* (4).

3rd. To recover lost possession. This is called Writ of *Complainte* (*Mandament van Complainte*) (5).

In order to obtain this remedy a person must have been in quiet and peaceful possession for more than a year and a day, and must have been ousted within the year (6).

(1) *L. 35, ff. de acq. vel am. poss.*; *L. 3, C. de interd.* § 4, *Inst. eod.*; *L. 1, § 3, ff. uti possid.*; *L. 3, C. quor. bon.* To this subject the well-known maxim, *Spoliatus ante omnia est restituendus*, belongs.

(2) Vide my *Verh. over de Judic. Prac.* 2 B. C. 20, § 1; *Keuren van Leijden*, Art. 185.

(3) *Verh. over de Jud. Prac. d. l.* §§ 2-4.

(4) Voet, *ad tit. ff. uti possid. n. 2.*

(5) *Verh. over de Judic. Pract.* 2 B. 21 C.

(6) *Inst. Hof. Art. 39, Inst. H. R. Art. 195*; Bort, *Tract. van Complainte*, Tit. 5, n. 36 and 38, and Tit. 6, n. 7.

For the benefit of persons who have been ousted from possession with violence, we have adopted in our practice the remedy of the Canon law (1), known as the Writ of *Spolie Mandament van Spolie* (2).

## CHAPTER XIV.

### ON OBLIGATIONS, AND THE PERSONAL RIGHTS ARISING FROM THEM, IN GENERAL.

#### SECTION I.

As we have now finished treating of *real rights* or rights *in rem*, we shall proceed to *personal rights* or rights *in personam*, by which not the thing itself is bound to us, but the person with whom we have dealt is bound to give us something or to do something for us. General nature of obligations.

Whenever we speak of "liability" (*verplichting*) in this branch of the law, we mean such a one as entitles us to compel the other party by legal proceedings to fulfil his obligations; because imperfect liabilities: e.g., the duties of love, gratitude, etc., belong to the province of ethics, but not to that of civil law (3).

The conditions necessary for the existence and validity of perfect obligations are:—

1st. A lawful source (*causa*) from which they spring.

(1) *Cap. sæpe contingit* 18, *X. de rest. spoliat. et Can. redintegranda* 3 and 4, *caus.* 3, *quæst.* 1.

(2) *Verh. over de Judic. Pract.* 2 *B.* 22 *C.*; Leyser, *Med. ad ff.* *Tom.* 7, *Spec.* 504–506; F. C. Fleck, *Comment. de interdicto unde vi et remedio spoli* (*Lips.* 1797).

(3) Pestel, *Fundam. Jurisp. Natur.* § 288, *seqq.*



2nd. Persons capable of binding themselves.

3rd. A thing capable of being the subject of an obligation.

## SECTION II.

Contracts.

The most general sources of obligations are *contracts*, i.e., "the agreements by which both parties mutually or only one of them, promise and bind themselves to the other party, either to give him something or to perform or not to perform something" (1).

When invalid.

All contracts derive their validity from the mutual and free *consent* of the contracting parties. Therefore contracts are imperfect and invalid—

I. When the parties are under a *mistake* (2) as to the subject of the agreement: e.g., when one intends to give something as a loan and the other thinks that he is receiving it as a gift (3); or as to the *actual*—but not an accidental—*quality* of the thing: e.g., when a person thinks he is buying silver and he buys silver-plated copper (4); or as to the *person* with whom the transaction takes place, and who was taken for some other person (5).

II. When the consent of one of the contracting parties is extorted by undue *violence* or *fear* (6); provided the violence is of such actual importance that it would make an impression upon a courageous

(1) Pothier, *Contr. & Verb.* 1 D. p. 7.

(2) L. 116, § 2, ff. *de Reg. Jur.*; L. 57, ff. *de obl. & act.*

(3) L. 9, ff. *de contr. empt.*

(4) L. 14, L. 41, § 1, ff. *de contr. empt.*; J. Averanius, *Interp. Jur. Lib.* 1, C. 19.

(5) Pothier, *Contr. & Verbint.* 1 D. p. 29.

(6) t. t. ff. *quod. met. caus.*; De Groot, *Intro.* 3 B. 48 D. § 6.

person (1); in determining which, the judge must take into consideration the circumstances both of the persons and of the things: e.g., that fear which cannot be deemed sufficient to disturb the mind of a person of mature age or of a soldier may be quite sufficient in the case of a woman or old man (2).

III. When a person has been induced to enter into a contract by the *fraud* of another (3). This rule is not, however, applied to the slight injuries which persons with whom we have contracted may have caused us *malâ fide*, and for which an action merely lies for damages. Only that which is a manifest violation of *bona fides* is considered by the court to be an actual fraud, sufficient to rescind the contract: e.g., all wrongful practices and artifices used by one party in order to induce the other to enter into the contract, without which the latter would not have made the contract (4).

IV. Whenever a person has been prejudiced to an *enormous extent* in respect of the price which has been agreed upon in a contract. A person is considered to have been *enormously* prejudiced when the price of the thing exceeds twice its fair value (5).

Contracts are not only invalid by reason of the want of free consent, but they are also void when made without any *causa* whatsoever, or on a false *causa*, or

(1) *L. 6, L. 7, ff. d. t.*

(2) Voet, *ad. d. t. ff. n. 11*; Leyser, *Medit. ad ff. Tom. 7, Spec. 517, Med. 1-3.*

(3) *t. t. ff. de dol. mal.*; De Groot, *Intro. 3 B. 48 D. § 7.*

(4) Pothier, *Cont. & Verbint. 1 D. pp. 43, 44.*

(5) *L. 2, C. de rescind. vend.*; De Groot, *Intro. 3 B. 52 D.*

on a *causa* which is contrary to justice, *bona fides*, or *boni mores* (1).

## SECTION III.

Who competent to contract.

In order that an agreement may exist it is also necessary that the parties should be capable of giving their consent and competent to bind themselves. Neither children, lunatics, nor persons of weak mind, as long as their mental weakness (*dwaasheid*) lasts, are capable of contracting by themselves, but they do so by the intervention of their guardians or curators (2). Persons who are so drunk that they have entirely lost the use of their reason are also incapable of contracting (3). Married women can only make an agreement or bind themselves to third persons with the assistance of their husbands (4). Prodigals are also incapable of making a contract as soon as they have been deprived of the administration of their property by the appointment of curators (5). It is also a fundamental rule of law on this subject, that only that which one of the contracting parties stipulates *for himself*, and also only that which the other party promises *for himself*, can constitute the subject of a contract (6). Whereas a stipulation in favour of or an acceptance *for a third person* is of no effect unless the third person subsequently accepts the promise and

(1) *t. t. ff. de cond. caus. dat. caus. non fec.—de cond. ob turp. vel inj. caus.—de cond. indeb.—de cond. sine caus.*

(2) *Vide supra, pp. 39, 41.*

(3) *De Groot, Intro. 3 B. 14 D. § 5.*

(4) *Vide supra, p. 23.*

(5) *Vide supra, p. 42.*

(6) § 19, *Inst. de inut. stipul.*; *L. 73, § ult. ff. de Reg. Jur.*; *L. 83, ff. de verb. obl.*; *Pothier, Cont. & Verb. 1 D. p. 68, et seq.*

thus acquires a right (1). This principle must not be extended so far as to prevent my stipulating that payment should be made to a third person instead of to myself (2); or also that something shall be done for a third person, if I myself have a direct interest in the act (3); or to prevent one from stipulating or promising for one's heirs (4) or other legal successors\* (5); or, lastly, from contracting by means of a third-person: e.g., by an agent (6).

#### SECTION IV.

The following rules deserve to be borne in mind in the construction of obligations:—

Rules for the construction of obligations.

1st. In agreements we should consider what was the general intention of the contracting parties rather than follow the literal meaning of the words (7).

2nd. When a stipulation is capable of two meanings, it should rather be construed in that sense in which it can have some operation than in that in which it cannot have any (8).

(1) De Groot, *Intro.* 3 B. 3 D. § 38. I see no reason to depart from this doctrine of De Groot as to our modern law. It is true, indeed, that Groenewegen, *ad* § 19, *Inst. de inut. stip.*, and Voet, *ad tit. ff. de verb. oblig. n.* 3, lay down the doctrine that according to our customs a person can stipulate and promise for another as well as for himself, but neither the analogy of our law, nor custom, nor precedents, authorise the proposed abrogation of the Roman law in this respect.

(2) This is called in law *adjectus solutionis gratia*.

(3) *L.* 38, §§ 20, 21, & 22, *ff. de verb. obl.*

(4) *L.* 10, *ff. de pact. dot.*; *L.* 38, § 14, *ff. de verb. oblig.*

\* E.g. a vendee, *L.* 17, § 5, *ff. de pact.*—Tr.

(5) *L.* 17, § 5, *ff. de pact.*

(6) Pothier, *Cont. & Verb.* 1 D. pp. 91–98.

(7) *L.* 219, *ff. de verb. sign.*

(8) *L.* 80, *ff. de verb. oblig.*



3rd. Whenever the words of a contract are capable of two meanings they should be construed in that sense which is most agreeable to the nature of the agreement (1).

4th. That which appears ambiguous in a contract should be construed according to usage of the place where the contract was made (2).

5th. Usage has such weight in the construction of agreements that the usual stipulations are understood to be included in them, although not expressly mentioned (3).

6th. A stipulation must be construed by the aid of the other stipulations contained in the contract, whether they precede or follow it (4).

7th. In cases of ambiguity a stipulation must be construed against the party who has stipulated for anything, and in favour of the release of the party who has contracted the obligation (5).

8th. However general the expressions may be in which an agreement is framed, they only include the matters in respect of which it appears that the contracting parties intended to contract, and not those which they did not contemplate (6).

9th. Under a general term are comprehended all the specific matters which constitute this generality, even those of which the parties had no knowledge (7).

(1) *L. 4, pr. ff. de usur.*

(2) *L. 34, ff. de Reg. Jur.*

(3) *L. 18, L. 19, C. de loc. & cond.*

(4) *L. 126, ff. de verb. sign.*

(5) *L. 32, § 18, L. 99, ff. de verb. obl.*

(6) *L. 9, § ult. ff. de transact.*

(7) *L. 29, C. de transact.*

## SECTION V.

There are also other sources (*causae*) of obligations besides contracts; viz., *quasi-contracts*, *crimes*, and *quasi-criminal offences*. We shall afterwards explain them. Other sources of obligations.

Nay, there are even obligations which, irrespective of contract or quasi-contract, crime or quasi-criminal offence, are founded only on *equity* and *law*. Of this kind are: e.g., the obligations of children to provide, if they are able, for the maintenance of their parents who are in indigent circumstances; the obligation of a married woman who, apart from her husband, has borrowed money and has profited by the loan, to return such money (1).

## SECTION VI.

The subject of an obligation may be either a thing properly so called (*res*), which the debtor binds himself to give, or an act (*factum*) which the debtor binds himself to do or to refrain from doing. Subject of obligations.

Every *thing* which is not *extra commercium* may form the subject of obligations—defined as well as undefined things: e.g., when some one binds himself to give me a horse without specifying which horse; provided the uncertainty is not such as to reduce the thing almost to nothing (2); \* also things the quantity

(1) On these *condictiones ex lege*, *actiones in factum*, so often mentioned in the civil law, see Westenberg, *De caus. oblig. Dis.* 3, 4, 5; Pothier, *Cont. & Verb.* 1 D. pp. 133, 134.

(2) L. 94, ff. de verb. oblig.

\* A person promises to give some corn: this is a question of fact, and not of law. Therefore, if he contemplated some corn,

of which is actually defined, and things whose quantity has still to be defined, e.g., if a person promises an indemnity from damage; also things already in existence and things whose existence is *in futuro*, e.g., when a person sells the wine which shall be made this year; also things which belong to the debtor, and things which belong to another person (1). In the latter case he is bound to buy it from the owner in order to be able to fulfil his promise, or, in case the owner refuse to sell it, to make good the damage arising from his non-performance (2).

In order that an *act* may form the subject of an obligation it must be possible (3). Acts contrary to the laws or *contra bonos mores* stand on the same footing as impossible acts (4). The act to which the debtor has bound himself must also be something definite, e.g., a promise to build a house, without saying where, is null and void (5). The act must be of such a nature that the person for whose benefit the obligation was entered into has an interest in its performance or forbearance, and this interest must be capable of being valued at a fixed sum (6).

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i.e., of a certain nature, and of a certain quantity, that is considered to have been expressed: but if he did not do so, although he may have wished to fix the nature and measure, he is deemed to have promised nothing, and therefore not even a peck (*L. 94, ff. de verb. oblig.*).—TR.

(1) *L. 28, ff. de contr. empt.*

(2) *L. 30, § 1, ff. de act. empt.*

(3) *L. 85, ff. de Reg. Jur.*

(4) *L. 15, ff. de cond. instit.*

(5) *L. 2, § 5, ff. de eo, quod. cert. loc.*

(6) Pothier, *Cont. & Verb.* 1 D. p. 149.

## SECTION VII.

A person who binds himself to *give* anything is bound to give it, at a suitable time and place, to the creditor or to some one who has the power or is competent to receive it in his stead (1). If that which is to be given consists of a certain definite thing, the debtor must take proper care in the preservation of the thing due, until payment thereof is made; and if the property is destroyed, lost or damaged, in default of such proper care, whether intentionally or through negligence, he is responsible to the creditor in damages and interest (2); but not when this happens through unforeseen accident or irresistible violence (3). He is also liable for the same damages if he does not deliver the thing in the proper time or manner (4). He must also pay for the fruits and the interest from the day on which, by proper notice, he was placed in a state of default (5).

The effect of obligations, which a person has contracted, to *do* something, consists in this, that he must perform the act to which he has bound himself, and that in case of non-performance he is bound to pay the damages and interest to the person for whose interest he has bound himself (6). If the obligation consists in *forbearing from some act*, and he neverthe-

(1) *t. t. ff. de solut.*

(2) *L. 5, § 2, ff. commod. ; L. 23, ff. de Reg. Jur.*

(3) *L. 11, § 5, ff. de minor. ; L. 52, § 3, ff. pro. Soc. ; L. 28, C. de loc. cond.*

(4) *L. 1, pr. ff. de act. empt.*

(5) *L. 32, § 2, L. 38, § 8, et seq. ff. de usur. ; L. 5, C. de act. empt.*

(6) *L. 13, ff. de re judic.*



less does it, he is bound to pay the damages and interest arising from the injury caused to the person for whose interest he bound himself to forbear from doing such act (1).

On the part of the creditor the effect of the obligation is that he has the right of demanding from the debtor personally or from his heirs, payment of that which the debtor has bound himself to give to him (2). This right he enforces, either by way of ordinary summons, or by summary execution if the obligation was entered into subject to a confession of judgment (*willige condemnatie*) (3). If the obligation consists in doing something, the creditor can compel the debtor to perform the act or to pay damages and interest (4).

By *damages and interest* is meant the loss which one has sustained and the profit which one has had to lose (5). The amount is, however, assessed subject to a certain limitation, so as not to exceed *twice* the value of the thing, calculated according to its actual value (6).

(1) *L. 121, ff. de Reg. Jur.*

(2) *L. 3, ff. de oblig. & act.*

(3) Pothier, *Cont. & Verb.* 1 *D. pp.* 163-5.

(4) This is the general opinion and most accepted in practice; otherwise the rule *Nemo potest præcise cogi ad factum* would seem to us more according to law. Vide Pothier, *d. l. p.* 166, and our notes thereon.

(5) *L. 13, ff. rat. rem hab.*; Pothier, *d. l. pp.* 168, 169.

(6) *L. un. C. de sent. quæ pro eo, quod int.* This law is also adopted in our practice. Groenewegen, *De L. L. abrog. ad d. L. un. p.* 674; Voet, *ad tit. ff. de verb. oblig. n.* 10; Bynkershoek, *Quæst. Jur. Priv. L. 2, C. 14, p.* 327.

### SECTION VIII.

Obligations are variously divided, according to their different names and subjects. They are divided into *natural* obligations, which are only binding in the forum of the conscience, and *civil* obligations, which give rise to an action at law; into *pure* or *simple*, which do not depend on any proviso or condition, and *conditional* obligations, which are contracted subject to some condition, either with a limitation of time or place; into obligations to *give* or to *do* something (1); into *liquid* and *illiquid*, according as it appears from the agreement itself or not, what is due, of what nature or how much (2); into *definite* or *indefinite*; into *single* or *alternative*, i.e., obligations in which several things are promised, but in such a manner that the performance of one is a satisfaction of the whole; into *several* (*solidaire*) obligations, in which each is liable for the whole, and *divided* or *joint* (*verdeelde*), in which payment by each of the debtors of his share is a satisfaction by him; into *divisible* and *indivisible*; into *principal* or original obligations, and *accessory* or collateral, e.g., guarantees; into *primary* and *secondary* obligations, e.g., to pay the penalties stipulated for in case of non-performance; into obligations with or without *mortgage*, with or without *preference*, etc.

### SECTION IX.

Some of the above-mentioned divisions still require some particular illustrations, for which purpose we make the following remarks:—

- (1) *L. 2, pr. ff. de verb. oblig.*
- (2) *L. 74, § 1, L. 75, ff. d. t.*

Division of obligations.

Remarks upon the different kinds of obligations.

1st. Although *natural* obligations afford no action, they have, however, this effect, that when the debtor has voluntarily made payment, it is valid and is not subject to be repaid (1).

2nd. Obligations are frequently suspended by some *condition* or proviso, i.e., they are made to depend on the happening of some future event (2) the happening or not happening of which is uncertain (3): provided, however, that it is possible, lawful, and not *contra bonos mores*, or contrary to the nature of the transaction (4). They are held to be fulfilled when the event which constitutes their subject happens, even although it happen after the death of the person for whose benefit the obligation was contracted (5). When the condition is limited to a certain time within which it must be fulfilled, it is necessary that the event should happen within the limited time; because if the time has elapsed without the happening of the event, the condition is deemed to have failed, and the obligation contracted subject to the condition falls at once to the ground. If the condition be *negative* (i.e., provided something shall *not* happen), it is not deemed to be fulfilled until it has become certain that the event will not happen, or until the time limited by the obligation has elapsed. The conditions are deemed to be fulfilled when the debtor who has bound himself

(1) *L. 13, L. 64, ff. de cond. indeb.*

(2) *L. 100, ff. de verb. oblig.; L. 37, L. 38, L. 39, ff. de reb. cred.*

(3) *L. 1, § 11, L. 31, ff. de obl. & act.; L. 7, ff. de verb. obl.*

(4) *L. 108, § 1, ff. de verb. oblig.*

(5) § 5, *Inst. de verb. oblig.* Obligations differ from legacies in this respect. *L. 59, cond. & dem.*

subject to them is himself and intentionally the cause of their not being fulfilled (1). When an obligation is contracted subject to more than one condition it is necessary that all of them should be fulfilled (2).

3rd. An obligation may be contracted either with or without the addition of the *time* of payment. If it be contracted without this addition, the creditor may immediately demand payment; but if the obligation contains a limitation of time he cannot claim payment until such time has elapsed (3). A limitation of time differs from a condition in this respect: the condition suspends the obligation which is to result from the agreement, whereas the limitation of time does not suspend the obligation, but only defers the performance (4). Since the limitation of time is presumed to be annexed for the benefit of the debtor, payment by him before the expiration of the time is good, and the creditor cannot refuse to accept in case the debtor wishes to make payment (5); provided it does not appear from the circumstances that the time of payment was fixed for the benefit of the *creditor* as well as of the debtor. As a trust in the solvency of the debtor is the foundation of the annexed limitation of time, the latter loses its force when the debtor becomes bankrupt or the mortgaged property is sold by execution (6).

(1) *L.* 85, § 7, *de verb. oblig.*; *L.* 81, § 1, *ff. de cond. & dem.*; *L.* 39, *ff. de Reg. Jur.*

(2) *L.* 129, *ff. de verb. oblig.*

(3) § 2, *Instit.*; *L.* 41, §§ 1, 2, *ff. de verb. oblig.*

(4) *L.* 16, § 1, *ff. de compens.*

(5) *L.* 70, *ff. de solut.*; *L.* 17, *ff. de Reg. Jur.*

(6) Pothier, *Cont. & Verbint.* 1 *D.* pp. 240, 241.



Whenever a certain place, at which payment is to be made, is inserted in an agreement, the creditor can no more oblige the debtor to pay elsewhere than at the appointed place, than the debtor could oblige the creditor to receive the money at any other place (1).

5th. Whenever the obligation contains an *illiquid* undertaking, no execution can issue upon it until it has become liquidated, either by mutual consent or by judgment of the court, e.g., when a person has bound himself by agreement to pay damages and interest, the latter must first be reduced by taxation to a fixed sum.

6th. In *alternative* obligations the debtor may elect what he will pay (2): provided it has not been agreed that the creditor shall have the choice. The debtor may indeed choose which one of the things promised he will pay, but he cannot pay a part of the one and a part of the other, any more than the creditor, if the choice has been left to him, can demand a part of the one thing and a part of the other (3).

7th. Generally, when a person enters into an obligation with respect to one and the same thing for the benefit of different persons, or *vice versâ*, when different persons jointly bind themselves for the benefit of one person, each of them is only creditor or debtor of that thing *for his share*. However, an obligation may also be contracted for the benefit of *one for all*, or so as to charge *one for all*, whenever this is the intention of the parties, in such manner, however, that payment made to

(1) Voet, *ad tit. de eo, quod. cert. loc.*

(2) *L. 25, ff. de contr. empt.*

(3) *L. 8, § 1, ff. de legat. 1.*

or by one of them discharges all. This is called an *obligation in solidum* (1). According to the general rule this obligation does not arise unless it has been expressly stipulated (2), except in a few cases: e.g., when the partners of a mercantile firm enter into any obligation on account of their trade (3), or when different guardians are burthened with one and the same guardianship (4), or when several persons have jointly worked together to commit a crime, and are sued for damages (5). When several persons contract a debt *in solidum* they are liable for the whole debt, but only as regards the creditor, for amongst themselves the debt is divided. As against the creditor, therefore, they have not got the *beneficium divisionis* (6), but the debtor *in solidum* who pays the whole debt has the right of having the actions ceded to him which the creditor has against the co-debtors *for the difference between that portion which was due by such debtor and the whole debt which he has paid (het meerdere)*; the creditor has no power to refuse him this cession of action whenever such debtor demands it; and if he was not in a condition to be able to give it he would lose his right of demanding payment *in solidum* (7). In case one of the debtors *in solidum* has paid without demanding a cession of action, he cannot afterwards make the creditor give it to him, since the entire right of action

(1) *t. t. ff. de duob. reis const.*

(2) *L. 9, pr. ff. d. t.*

(3) V. D. Keessel, *Thes.* 702-704.

(4) Voet, *ad tit. ff. de magistr. conven. n. 6.*

(5) *L. 11, § 2, ff. ad Leg. Aquil.*; De Groot, *Intro. 3 B. 34 D. § 6.*

(6) Neostadius, *Dec. Cur. Holl.* 49; V. D. Berg, *Nederl. Adv. Boek*, 3 D. C. 235, *Bell. Jurid. C. 24.*

(7) *L. 47, ff. loc. cond.*

of the creditor is extinguished by payment (1); but this does not debar the debtor from claiming in his own right from each of his co-debtors the share of the debt for which each is liable, inasmuch as the co-debtors of him who has paid the whole debt are either his partners,\* or, by reason of their joint obligation *in solidum*, must be regarded as his sureties (2).

8th. When an obligation is *divisible*, each heir of the debtor is only liable for the share in respect of which he is heir (3), and each of them is discharged by payment of his share. But if the obligation is *indivisible*, then each debtor is liable for the whole debt, although he has not bound himself *in solidum* (4); and each of the heirs of the creditor may demand the whole of the indivisible thing from the debtor (5); just as, *vice versa*, the whole thing may be claimed from each of the heirs of the debtor (6).

9th. In order to secure the fulfilment of an obligation and to indemnify the creditor against its non-performance, it is useful and usual to stipulate for a *penalty* in case of failure of performance.

If the principal obligation is void, the nullity of the

(1) *L. 76, ff. de solut.*

\* The text I have before me reads, "aangezien zij medeschuldenaars of Compagnons zijn van hem . . . of als zijne borgen beschouwd moeten worden"—"inasmuch as they are co-debtors or partners of him who," etc. I have preferred to read the word *zijne* instead of *zij*.—Tr.

(2) Pothier, *Cont. & Verb.* 1 D. pp. 297-302.

(3) *L. 2, C. de hered. act.*

(4) *L. 192, ff. de Reg. Jur.*

(5) *L. 2, § 2, ff. de verb. oblig.*

(6) *L. 11, § 23, ff. de legat. 3; L. 2, § 5, ff. de verb. oblig.* The divisibility and indivisibility of obligations is specially treated of by Pothier, *Cont. & Verb.* 1 D. pp. 312-371.

penalty follows as a matter of course (1); but, on the other hand, the nullity of the penal obligation does not induce that of the principal obligation (2). The penalty, stipulated for in case of non-performance of an obligation, may be reduced and fixed by the court, if it be excessive (3). A debtor who performs one portion of his obligation with the consent of the creditor is released from the penalty in respect of the part performed (4).

## SECTION X.

Just as a real right of mortgage or hypothec is Guarantees. often given to a creditor as a further security (5), so the collateral personal obligation of a *surety* (6) is frequently annexed to the principal obligation for the same purpose.

A *guarantee* is a contract by which a person binds himself for a debtor, for the benefit of the creditor, to pay the latter the whole or part of that which the debtor owes him, thus becoming a party to his obligation. From the above definition it follows that—

1st. No guarantee can exist unless there is a valid principal obligation on the part of the principal debtor (7).

2nd. The surety does not release the principal debtor

(1) *L.* 129, § 1, *ff. de Reg. Jur.* ; *L.* 69, *ff. de verb. oblig.*

(2) *L.* 97, *ff. de verb. oblig.*

(3) Bynkershoek, *Quæst. Jur. Priv. Lib.* 2, *C.* 14.

(4) *L.* 9, § 1, *ff. si quis caut. in jud.* Vide further on penal obligations, Pothier, *d. l.* pp. 372–415.

(5) Vide *supra*, p. 91.

(6) *pr. Inst. de fidejuss.*

(7) *L.* 178, *ff. de Reg. Jur.*



from his obligation, but contracts an obligation collateral to it; in which respect a surety differs from a person who takes over the debt of another (1).

3rd. A surety cannot bind himself in a valid manner except for the whole or part performance of the same thing for which the principal debtor is bound (2).

4th. A surety cannot bind himself for more (though he can for less) than that for which the principal debtor is bound, whether this excess relates to the amount of the sum or the conditions of the debt. Should he however do so, he would only be bound to the extent of the principal obligation, and no further (3).

5th. The extinction of the principal obligation also induces the extinction of the guarantee (4). All grounds of defence which the principal debtor has against the creditor, e.g., the perpetration of fraud or violence, the surety is also entitled to (5); unless the defence was peculiarly personal to the principal debtor, e.g., if the principal debtor has made a *cessio bonorum*, and thus cannot be sued until he is in better circumstances, the surety cannot avail himself thereof (6).

6th. The guarantee is extinguished when the two characters of principal debtor and surety become united

(1) Such a person is called an expromissor. *L. 7, § 8, ff. de dol. mal.*; J. Averanius, *Interpr. Jur. Lib. 2, C. 15.*

(2) *L. 42, ff. de fidejuss.*

(3) This, upon equitable principles, has been thus adopted by our modern law: Voet, *ad tit. ff. de fidejuss, n. 4*; V. D. Keessel, *Thes.* 499, contrary to the doctrine of the Roman law, according to which a guarantee contracted for a larger amount was entirely void. C. F. Walchii, *Introd. in Controv. Jur. Civ. Sec. 3, C. 4, Membr. 2, Sub-s. 2, § 7, p. 563*; J. Averanii, *Interpr. Jur. Lib. 2, C. 3.*

(4) *L. 4, C. de fidejuss.*

(5) *L. 7, § 1, L. 19, ff. de except.*

(6) Pothier, *Contr. & Verbint*, 1 D. pp. 435-448.

in one and the same person: e.g., when one becomes heir to the other (1).

Guarantees are entered into *either* by virtue of contract, *or* by operation of law: e.g., that which a usufructuary enters into for the redelivery of the property; *or* by order of the court: e.g., when money paid into court is taken out.\*

Specially included among the persons who cannot become sureties for another are *women*, whose guarantees are rendered void by the *Senatus Consultum Velleianum* (2); even when they become sureties for their husbands (3). However, the generally accepted practice is that women may renounce this privilege (4).

When a guarantee has to be entered into not by virtue of an agreement but by operation of law or by order of the court, the surety must be a solvent person who can also easily be sued on the spot (5). This is termed a surety who can be *justified*. In case such a surety afterwards becomes insolvent the debtor may be compelled to give another guarantee (6).

A person may become surety for any debtor, and for the benefit of any creditor whatsoever; and also without any reference to the nature of the principal

(1) *L.* 93, § 2, & *fin. ff. de solut.*; *L.* 5, *ff. de fidejuss.*; *L.* 4, *C. eod.*

\* *Consignatio*: payment into court of money of which the legal owner cannot be found; or payment by a debtor in case the creditor refused to receive the money. The debtor could take such money out again (Voet, *De sol. ff.* 46, 3, 29).—Tr.

(2) *t. t. ff. & C. ad SCt. Vellej.*

(3) *Auth. si qua mulier C. eod.*

(4) De Groot, *Intro.* 3 *B.* 3 *D.* §§ 18, 19; V. D. Keessel, *Thes.* 496.

(5) *L.* 2, *ff. qui satisd. cog.*

(6) *L.* 10, § 1, *ff. qui satisd. cog.*; *L.* 4, *ff. de stipul. Prætor.*

obligation, whatever it may be (1): provided it be not invalid at law (2).

A person may become surety not only for a principal obligation but also for a guarantee: this is termed a *sub-guarantee* (*agterborgten*); moreover, not only for an obligation already contracted, but also for an obligation which has still to be contracted (3).

A guarantee may be entered into either by a judicial or by a notarial, or even an underhand (non-notarial) instrument, provided the intention of becoming surety is clearly manifest: because the assurance, for example, that a person is an honest and solvent man who is sure to pay does not exactly amount to a guarantee (4).

In the construction of guarantees careful attention should be paid to the wideness of the terms (5).

If the terms are general and indefinite the surety is deemed to have bound himself for all the obligations of the principal debtor which flow from the contract for which he became surety (6).

However wide and general a guarantee may be, it only extends to the obligations which flow from the contract itself, and not to those which flow from any extraneous source (7).

Guarantees are extinguished in the same way as other obligations. A surety, however, cannot consider

(1) *L. 1, L. 16, § 3, de fidejuss.*

(2) *L. 16, § 1, ff. ad SCt. Vellej.; L. 14, C. eod.; L. 70, § ult. ff. de fidejuss.*

(3) *L. 6, § ult. ff. de fidejuss.*

(4) *Voet, ad tit. ff. mand. n. 4.*

(5) *L. 68, § 1, ff. de fidejuss.*

(6) *L. 52, § 2, ff. de fidejuss.; L. 2, §§ 11, 12, ff. de adm. rer. ad civit. pertin.; L. 54, ff. locat.*

(7) *L. 54, ff. de fidejuss.; L. 68, L. 73, ff. eod.*

himself released from the guarantee because the creditor has granted further time for payment to the principal debtor, without the knowledge of the surety (1); because, if he had been unwilling to remain bound any longer, he should have given notice to the creditor, that he withdrew the guarantee (2).

Several important privileges are granted by law to sureties.

1st. The *beneficium ordinis seu excussionis*, by which the surety can compel the creditor, who demands payment of his arrears, first of all to excuss the property of the principal debtor (3). The surety, however, generally renounces this privilege, and he is also deemed to have tacitly done this if he becomes *surety as principal* (4) [lit., *surety and principal debtor*].

2nd. The *beneficium divisionis*, by which each of several persons, who have become sureties for the principal debtor for the same debt, may, when sued by the creditor for the whole amount, demand that the latter should divide his claim between such surety and his co-sureties, in so far as the latter are not insolvent (5). This privilege also is generally renounced in the instrument of guarantee.

3rd. The privilege, on making payment, of demanding from the creditor a cession of all his rights and actions, both against the principal debtor for whom the surety became such, and against all other persons who

(1) Vide my *Verz. van Gewijsden*, 1 D. C. 34.

(2) L. 38, ff. *mand.* ; L. 10, C. *eod.*

(3) Nov. 4, C. 1; Pothier, *Cont. & Verb.* 1 D. pp. 481-494.

(4) Voet, *ad tit. ff. de fidejuss.* n. 16.

(5) § 4, *Inst. de fidejuss.* ; Pothier, *d. l.* pp. 494-506.



were liable for such debt (1) (*beneficium cedendarum actionum*).

After the surety has made payment, and if he has made the creditor give him cession of action, he may use the latter against the debtor in the same way as the creditor might have done. If he has neglected to obtain this cession he has nevertheless an action in his own right against the principal debtor to recover that which he has paid on the latter's account (2). He has also the right, if several persons have become sureties, to demand from each of them his share of the whole debt paid by such surety (3).

## CHAPTER XV.

### ON OBLIGATIONS ARISING FROM CONTRACTS AND QUASI-CONTRACTS.

#### SECTION I.

Remarks on  
passing over to  
this chapter.

HAVING now treated of the nature, various modifications, and the effects of obligations in general, we have now to inquire, what are the peculiarities of each kind of contract or quasi-contract from which an obligation flows.

Gift or  
donation.

I. We shall commence with *gift*, or *donation*, which is an agreement by which a person through liberality irrevocably parts with something for the benefit of

(1) *L. 17, ff. de fidejuss. ; L. 21, C. eod.*

(2) Voet, *ad tit. ff. de fidejuss. n. 31* ; Pothier, *d. l. pp. 508-521.*

(3) Pothier, *d. l. pp. 533-538.*

another, who accepts it (1). Very often, nay, almost always, they are founded on the reward and gratitude for previously performed services (2). Sometimes the contemplation of death, or of an imminent deadly danger, is the cause of the donation, which is then called *donatio mortis causa* (3); otherwise it is termed a *donatio inter vivos*.

Every person who has the free administration of his property can make a gift (4) to any person whom the law does not prohibit from accepting the gift. Thus a father cannot make a gift to his minor son, who is still subject to his power (5); nor husband and wife to each other, except in so far as the donation is confirmed by death (6); nor a married woman without the consent of her husband—but the husband may, apart from the wife, unless the circumstances show a wilful intention of prejudicing her (7); nor a minor to his guardian; nor a prodigal to his curator; nor a sick person to his physician: especially when the donations have the slightest appearance of being excessive (8). Everything which is saleable may be the subject of a donation (9); not only a particular piece of property, but also a certain entirety: e.g., an inheritance which has devolved upon the donor (10). A gift, however, of

(1) *t. t. Inst. D. & C. de donat.*

(2) Voet, *ad tit. ff. de donat. n. 3.*

(3) *t. t. ff. de mort. caus. don.*

(4) *L. 12, C. de donat.; L. 21, C. mand.*

(5) De Groot, *Intro. 3 B. 2 D. § 8*; Voet, *ad tit. ff. de donat. n. 6.*

(6) *t. t. ff. de donat. int. vir. & ux.*

(7) Voet, *ad tit. ff. de rit. nupt. n. 54.*

(8) Voet, *ad tit. ff. de donat. n. 9.*

(9) *L. 14, C. de donat.*

(10) *L. 28, ff. eod.*

all one's property is invalid, as a person thereby deprives himself of the power of being able to make a will (1).

No donation is valid unless the donee has accepted it (2); but it is immaterial whether the acceptance is made in the instrument itself, by a letter, or in any other way, provided it is sufficiently clear (3). The rule laid down by the Roman laws, that a donation of more than the value of 500 aurei should be publicly registered, is not in force among us in such form (4); but immovable property given as a gift must be judicially transferred, and a duty of the fortieth penning ( $2\frac{1}{2}$  per cent.) thereof must be paid (5); so also the same duty has to be paid on property, which in case of intestacy would devolve on collaterals, if a *donatio inter vivos* be made thereof (6).

The effect of a valid donation is that the donee has an action against the donor to place him (the donee) in possession of the thing given (7); that the ownership in the gift passes by delivery, without the donor, however, having to warrant the property (8); that from its nature it is irrevocable (9).

This irrevocability is, however, subject to some exceptions:

(1) De Groot, *Intro.* 3 B. 2 D. § 11; Loenius, *Decis.* C. 123; V. D. Keessel, *Thes.* 487.

(2) *L.* 10, ff. *de donat.*

(3) Voet, *ad tit.* ff. *de donat.* n. 12.

(4) De Groot, *Intro.* 3 B. 2 D. § 15.

(5) *Ordonn. op den 40sten pen.* 9 May, 1744.

(6) *Ordonn. op 't Collateraäl*, 11 March, 1723, *Art.* 1.

(7) *L.* 35, *C. de donat.*

(8) Voet, *ad tit.* ff. *de evict.* n. 13.

(9) *L.* 35, § ult. *C. de donat.*; *L.* 5, *C. de revoc. donat.*

1st. On the ground of gross ingratitude and ill-treatment (1).

2nd. On the ground that the donor of a gift of great value afterwards begets legitimate children (2).

3rd. When the donation is so excessive that the children are thereby prejudiced in their legitimate portion (3); in which case the whole gift is not annulled, but only the *pars inofficiosa* (4).

If the gift be a *donatio mortis causa*; in which case it may at any time be revoked by the donor, if he survive (5).

## SECTION II.

Another sort of contract is that of *loan*, which Loan. varies in its nature, according as it affects things which do or do not perish by use. The former is called a *loan of consumables* (*mutuum*), the latter a *loan of things not consumable* (*commodatum*) (6).

II. *Mutuum*, or loan of consumables, is a contract Loan of consumable articles. by which one of the contracting parties transfers the ownership in a sum of money, or a certain quantity of things, which are consumed by use (7), to the other party, who binds himself to return just as much of the same quality (8).

(1) De Groot, *Intro.* 3 B. 2 D. § 17; Voet, *ad tit. ff. de donat.* n. 22-25.

(2) L. 8, C. de *revoc. donat.*; Voet, *ad tit. ff. de donat.* n. 27, *seqq.*

(3) *t. t. C. de inoff. donat.*

(4) L. 7, C. de *inoff. donat.*; De Groot, *Intro.* 3 B. 2 D. § 19, Voet, *ad tit. ff. de donat.* n. 37.

(5) § 1, *Inst. de donat.*

(6) *Mutuum.—Commodatum.*

(7) *Res fungibiles.*

(8) L. 2, *ff. de reb. cred.*



It is necessary for the existence of this contract :

a. That the subject thereof be either a sum of money or something which is consumed by use, e.g., grain, oil, wine, firewood, etc. Almost everything determined by weight, number, or measure, may be included in this class (1).

b. That the money or other thing be handed over by the lender to him who borrows it. Without this handing over and actual delivery this transaction is not valid (2).

c. That the ownership in the thing lent passes to the borrower (3). The lender must therefore be owner thereof (4).

d. That the borrower be bound to return as much of the same quality, although in the meantime the price of that thing may have risen or fallen (5).

e. That both the contracting parties are by mutual consent at one on all these points (6).

From this contract, although only obligatory on one side, arises an action which lies for the lender, or his heirs, against the borrower, or his heirs, for the re-delivery of a like sum of money or of a like quantity of the same kind of things which were lent (7), either after the expiration of a certain time fixed by the contract, or otherwise after a reasonable time, to be determined by the court (8).

(1) *d. L. 2, § 1.*

(2) Voet, *ad tit. ff. de reb. cred. n. 4.*

(3) *d. L. 2, § 2.*

(4) *d. L. 2, § 4.*

(5) Voet, *d. t. n. 24* ; J. Averanius, *Interp. Jur. L. 3, C. 11 & 12.*

(6) *L. 18, § 1, ff. eod.*

(7) Voet, *d. t. n. 15, seq.*

(8) *Ibid. n. 19.*

### SECTION III.

In loans, especially of money, *interest* is very often stipulated for. And on this subject we have to remark:

1st. That this stipulation may not exceed *six per cent.* (1). If more is stipulated for it is held to be *usury*, and is punishable.

2nd. That interest is sometimes due without any stipulation to that effect, on the ground of default, or neglect in the performance (of the obligation). When the performance is fixed for a time certain, interest runs from that day. If no time is fixed, it is due from the day upon which the debtor is sued (2). This non-stipulated for interest is, however, not reckoned at more than 4 per cent. (3).

3rd. That the accumulated interest may not exceed the principal sum (4).

4th. That interest may not be calculated upon interest, nor may the principal sum be increased by interest [i.e., no compound interest is allowed.—Tr.] (5).

### SECTION IV.

III. Whenever the loan relates to things which are not consumed by use, it is called *commodatum*, which

Loan of  
things not  
consumable.

(1) De Groot, *Intro.* 3 B. 10 D. n. 29; Loenius, *Decis. Cas.* 21; Voet, *ad tit. ff. de usur. n.* 3 & 11.

(2) Voet, *d. n.* 11.

(3) Zurck, *Voce Renten*, § 1, n. 3.

(4) Voet, *ad d. t. n.* 19.

(5) L. 28, *C. de usur.*; Voet, *ad d. t. n.* 20.

is a contract by which one party gratuitously hands over to the other a certain thing, to be used by him in a certain manner, and by which the party who receives it binds himself to return it after having used it in such fixed manner (1).

It is necessary for the existence of this contract :

*a.* That there be a certain thing which is lent. Everything may be used for this purpose which is an object of commerce, especially *movable* property : e.g., a carriage, a horse, a book, etc., but, sometimes also *immovable* property ; thus one friend lends another his cellar, his loft, a room in his house, etc. (2). Things which are not saleable can also not be the subject of a loan : e.g., prohibited books (3). Things which are consumed by use are unsuited for transactions of this kind, unless they are lent merely to serve as ornaments (4).

*b.* That the property be lent for a certain fixed use. This limitation must be strictly observed, or one becomes guilty of a sort of theft (5). The person who borrows anything is also bound to take all possible care that the property is preserved and not damaged (6). Any negligence in this respect makes him liable for damages (7), and nothing can exonerate him therefrom except irresistible violence or calamity (8).

(1) *t. t. ff. & C. commod.*

(2) *L. 1, § 1, ff. d. t.*

(3) *L. 6, C. de pact.*

(4) *L. 3, § ult. ; L. 4, ff. commod.*

(5) *L. 5, § 8, ff. eod. ; L. 1, § ult. ; L. 40, ff. de furt.*

(6) *L. 1, § 4, ff. de obl. & act. ; L. 5, § 2, ff. commod.*

(7) *L. 20, L. 21, § 1, ff. commod.*

(8) *L. 5, § 4, ff. commod. ; L. 1, § 4, ff. de obl. & act.*

c. That the use must be granted *gratuitously*, otherwise it is not *commodatum*, but hire (1).

d. That the same thing which is lent be returned in the same condition (2), and after the expiration either of the time stipulated for or of such a period as is required for the use, to be determined by the court when necessary (3). Sometimes the loan is simply to last until revocation (4).

Two actions flow from this contract :

The *first* (5) lies for the lender against the person who has received the loan, and his heirs, for the delivery of the property lent, or its value if delivery has become impossible by his fault; also for compensation for all injury caused by damage done to the property, or by reason of its not being returned in time; and, finally, for delivery of all the fruits produced by the property in the meantime (6).

The *other* action (7) lies for the person who received the loan, against the lender for an indemnity : e.g., if the property lent had some defect, known to the lender, which has occasioned damage; if he has been put to extraordinary expense on account of the damage; if the lender, or some person on his behalf, has obstructed him in the use (of the property) (8).

(1) § 2, *In fin. Inst. quib. mod. re contr. obl.*; L. 59, § 3, *ff. de præscr. verb.*

(2) L. 3, § 1, L. 19, *ff. commod.*

(3) L. 5, *pr.*; L. 17, § 3, *ff. eod.*

(4) L. 1, *ff. de precar.*

(5) *Actio commodati directa.*

(6) Voet, *ad tit. ff. commod. n.* 2-7.

(7) *Actio commodati contraria.*

(8) Voet, *ad d. t. n.* 8, *seq.*



## SECTION V.

Depositum.

*Depositum* (1) is a contract by which a person intrusts some property to the care of another, who charges himself gratuitously with such care, and binds himself to return the property on demand (2). The property which is deposited must be *corporeal* and also *movable*. This contract is not applicable to *immovable* property, as the latter cannot be removed, but is always to be found again; and if, for example, on going abroad a person gives the keys of his house to a friend, this is rather a deposit of the keys and the furniture, to which by this means access is obtained, than of the house itself (3).

The nature of this contract requires:

*a.* A delivery over of the property which is deposited.

*b.* That the property is delivered over for the purpose of being deposited. If this should take place with any other intention, then it is another kind of contract (4).

*c.* That the deposit be undertaken *gratuitously*: because if anything is stipulated for, it is a contract of hire (5).

*d.* That the contracting parties are, by mutual consent, at one, whether this be declared orally or in writing, expressly or tacitly (6).

(1) *Depositum* (*Bewaargeving*).

(2) *t. t. ff. & C. depos.*

(3) Pothier, *Traité du Contrat de Depot*, Chap. 1, Art. 1.

(4) *L. 8, ff. mand.*; *L. 1, §§ 12, 13, ff. depos.*

(5) *L. 1, § 8, ff. depos.*

(6) *L. 1, § 8, ff. naut. caup. stabul.*

A twofold action is again the result of this contract :

The *first* (1) lies for the person who makes the deposit against the person who has accepted the deposit, or his heirs, for the re-delivery of the property deposited, and for damages for the injury occasioned to the property by his fault or neglect (2).

The *other* action (3) is given to the person who accepts the deposit against the person who makes the deposit for an indemnity : e.g., on account of all disbursements which he has been put to in the care of the property ; also for all injuries which he has suffered on that account, without any fault on his part (4) ; for obtaining all of which he has a lien (right of retention) upon the property until he has been satisfied (5).

## SECTION VI.

*Sequestration* and *consignation* very closely resemble the contract of deposit (6).

Sequestration  
and consignation.

*Sequestration* is the deposit of any property, which is in dispute, with a third person, appointed by agreement or by the court, to be handed over when the dispute is settled to the person who is adjudged to be entitled to such property (7). Such a sequestration is ordered by the court : when, e.g., it place a person in charge of goods taken in arrest ; when an estate is left

(1) *Actio depositi directa.*

(2) Voet, *ad tit. ff. depos. n.* 4-9.

(3) *Actio depositi contraria.*

(4) Voet, *ad d. t. n.* 10.

(5) Leyser, *Medit. ad ff. Tom. 3, Spec.* 176, *Med.* 2 & 3.

(6) Pothier, *Traité du Contrat de Depot, Chap.* 4.

(7) *L.* 110, *ff. de verb. sign.* ; *L.* 17, *ff. depos.* ; *L.* 5, *C. eod.*

without any one to look after it by reason of the debts being in great confusion ; or when an inheritance is left of which the heir is unknown.

*Consignation* consists in the acceptance and care of moneys of which the true legal owner is uncertain (1). It is made use of whenever a debtor is unwilling to remain charged with money which his creditor will not accept or is unable to accept, because a third person has attached it. Money produced by the sale under execution of any immovable property, and which cannot be paid over until the order of ranking thereon is decided, is also placed in *consignation* (or paid into court).

## SECTION VII.

Pledge.

Although the right which a creditor has upon the property which the debtor has delivered to him, as a further security for his arrears, belongs to the class of real obligations (2), yet the agreement itself by which the pawn is constituted, and which is called a *pledge*, is of such a nature that it induces personal obligations and actions (3).

The *first* (4) of these actions lies for the debtor, who has paid the whole of his debt with interest (5), against the creditor for the redelivery of the property pledged or for its value if it has been lost through the negligence of the creditor ; further, for damages for injuries caused to the property through the fault of the

(1) Voet, *ad tit. ff. de solut. n.* 29.

(2) Vide *supra*, Cap. XII. p. 91, *et seq.*

(3) *t. t. ff. de pignor. act.*

(4) *Actio pignoratitia directa.*

(5) *L. 9, § 3, ff. de pign. act.*

creditor; and, lastly, for the delivery and an account of all the fruits which have resulted from the property pledged, unless by the contract of pledge it was stipulated (1) that the creditor should enjoy the fruits in lieu of interest. Of course if the creditor has, in default of payment, sold the pledge, this action does not lie any more for the redelivery of the property, but for the rendering of an account of such sale, and for payment of the surplus which may remain after the debt has been paid off (2).

The *other* action (3) lies for the creditor against the debtor for an indemnity: e.g., when the latter has pledged some property to the creditor which did not belong to the debtor, or which was already pledged to another person, or which through some internal defect was not of sufficient value, and therefore could not serve as a security for the creditor; so also when the creditor has been put to any necessary expenses in the preservation of the property (4).

### SECTION VIII.

Of all the dealings of human society, there is none more common or more frequent than that of *purchase and sale*. By this is understood the agreement to make over to another a certain property for a fixed price (5). There are therefore three things requisite for a sale: the *property*, the *purchase-money* (or price), and the *mutual consent*.

(1) *Pactum antichresticum*.

(2) Voet, *ad tit. ff. de pign. act. n.* 2-9.

(3) *Actio pignoratitia contraria*.

(4) Voet, *ad d. t. n.* 10.

(5) *L.* 5, § 1, *ff. de præser. verb.*; De Groot, *Intro.* 4 *B.* 14 *D.* § 1.



There must be certain *property* in existence, which is bought and sold, because no sale takes place if the property has never been in existence or now no longer exists (1).

However, things *in futuro* may be sold: e.g., the fruits which shall be produced this year on certain land (2). Even the *hope* or *expectancy* of a thing may be sold. Thus, although there may be a total failure of the crop this year, yet the purchase-money is due; and, *vice versâ*, if the harvest be so valuable as to exceed the amount of the purchase-money six or more times, yet the purchaser is entitled to all the fruits (3). No one can buy his own property (4), but one may purchase property of which one has only the usufruct (5), or property which one has in common with another, to wit, to the extent of the co-proprietor's share (6).

The second essential requisite of a sale is the *purchase-money* (or price) (7). This can only consist of *money* (8); because if anything else is given in lieu thereof it is not a sale, but an *exchange* (9). This price must be an *actual* and not a fictitious or pretended price, otherwise the transaction is a *donation* (10);

(1) *L. 1, L. 7, ff. de her. vel act. vend.*; *L. 15, pr.*; *L. 57, pr. §§ 1 & 3, ff. de contr. empt.*

(2) *L. 8, pr.*; *L. 78, § 3, ff. de contr. empt.*; *L. 25, ff. de act. empt.*

(3) *L. 8, § 1*; *L. 11, § ult.*; *L. 12, ff. de act. empt.*

(4) *L. 16, pr.*; *L. 39, ff.*; *L. 4, L. 10, C. de contr. empt.*

(5) *L. 16, § 1, ff. eod.*

(6) *L. 18, pr. ff. eod.*

(7) *L. 72, pr. ff. eod.*

(8) *§ 2, Inst. de empt. vend.*

(9) *d. § 2*; *L. 1, pr. and § 1, ff. de contr. empt.*

(10) *L. 21, C. de transact.*; *L. 3, L. 9, C. de contr. empt.*

and it must be *fixed*, whether absolutely, or relatively to something else: e.g., if I sell you my land for the same price per morgan as Peter sold his (1). The price may indeed be left to be fixed by a third person, but not by one of the contracting parties (2).

The principal requisite of purchase and sale is the mutual *consent* (3). Therefore no one is forced to sell anything, whether willing or unwilling (4), except when the sovereign power requires certain property for the future public benefit, and therefore obliges the owner to part with it for a fair compensation (5). This consent must be free and unconstrained; without any obstacle in the way of the contracting parties by reason of fraud, fear, or mistake (6).

All things which are not excluded from commerce are saleable (7). Under the things excluded fall such as are destined for sacred uses or for the service of the State or town (8); property which is prohibited by last will from being alienated (9); stolen goods (10); contraband goods may not be sold to the enemy (11); machinery appertaining to manufactories may not be exported to foreign countries (12); houses may not be

(1) *L. 7, § ult. ; L. 37, ff. de contr. empt.*

(2) *L. 35, § 1, ff. ; L. ult. C. eod.*

(3) *L. 1, § ult. ; L. 2, C. eod. ; L. 55, ff. de obl. & act.*

(4) *L. 71, ff. ; L. 11, L. 13, L. 14, C. eod.*

(5) *Vide supra, pp. 101-104.*

(6) *Vide supra, p. 51.*

(7) *L. 6, pr. ; L. 34, § 1, ff. de contr. empt.*

(8) *L. 6, pr. ; L. 22, L. 23, L. 24, L. 51, L. 62, § 1, ff. eod.*

(9) *L. ult. §§ 2, 3, C. comm. de legat.*

(10) *L. 34, § 3, ff. de contr. empt.*

(11) *Voet, ad tit. ff. de contr. empt. n. 18.*

(12) *Plac. Gen. 17 Apr. 1624 ; G. P. B. 1 D. p. 1164 ; Plac. Gen. 17 Oct. 1753 ; G. P. B. 8 D. p. 1281 ; Plac. Gen. 18 June, 1755 ; ibid. p. 1286 ; Plac. Gen. 31 Jan. 1776 ; G. P. B. 9 D. p. 1345.*

sold for the purpose of being pulled down, without permission first obtained (1); shop goods for the purpose of being carried round past houses, which is commonly called *hawking* (2). The property of another is not saleable (3); but if the vendor has thereby willingly and knowingly deceived an ignorant vendee, he is liable for damages (4).

A sale is deemed to be *completed* as soon as the contracting parties are both agreed as to what is sold, and as to its kind, quantity and price (5). For this completion nothing else is necessary than consent; and in no case the delivery of the property (6), or the counting out of the purchase-money (7), or the execution of the written instrument, unless the latter was expressly agreed upon (8). A conditional sale is not complete until the condition is fulfilled (9). The sale of things which are sold by weight, number or measure, is not complete until the weighing, counting or measuring has taken place (10).

(1) *Public. Holl.* 23 *June*, 1797.

(2) *Plac. Holl.* 12 *Apr.* 1749, *Publ.* 12 *Aug.* 1802.

(3) *L.* 1, *C. de comm. rer. alienat. t. t. C. de reb. al. non alien.*

(4) *L.* 30, § 1, *ff. de act. empt.*

(5) *L.* 8, *pr. ff. de per. & comm. rei vend.*; *L.* 1, § *ult. ff. de contr. empt.*

(6) *L.* 1, § 2, *ff. de rer. perm.*

(7) *L.* 2, § 1, *ff.*; *L.* 9, *C. de contr. empt.*

(8) *pr. Inst. de empt. & vend.*; *L.* 10, *L.* 17, *C. de fid. instr.*

(9) *L.* 7, *pr. & § 1*; *L.* 81, *pr. ff. de contr. empt.*; *L.* 43, § 9, *ff. de edil. edict.*

(10) *L.* 35, §§ 5-7, *ff. de contr. empt.*; *L.* 2, *C. de per. & comm. rei vend.*

## SECTION IX.

The consequences of purchase and sale vary as they relate to the vendee or vendor. Effects of purchase and sale.

Before delivery, although the sale has been completed by mutual consent, the vendor remains the owner (1), and vendee and vendor have only a personal action against each other for the performance of their respective obligations.

The *first* (2) of the sections lies for the vendee or his heir against the vendor or his heir. The *other* (3) lies for the vendor or his heir against the vendee or his heir (4).

The vendor is bound to deliver to the vendee the property sold, and to place him in possession thereof (5), either immediately or at the time fixed by the contract (6). If he does not make delivery at the proper time, he is liable in damages for the injury caused thereby (7). He must also deliver with the property everything that belongs to it: e.g., with a house all that is attached to it by the soil or by nails (8). Should the property sold have any substantial defect or be burdened with any secret charge, he is bound to make a relative reduction in the price,

(1) *D. 8, L. 11, C. de act. empt.*

(2) *Actio empti.*

(3) *Actio venditi.*

(4) *t. t. ff. de act. empt.*

(5) *L. 8, C. de act. empt.*

(6) *L. 14, ff. de Reg. Jur. ; L. 10, C. de act. empt.*

(7) *L. 1, pr. ; L. 3, § 1 ; L. 11, § 9 ; L. 12, ff. ; L. 4, L. 22, C. eod.*

(8) *De Groot, Intro. 3 B. 14 D. § 22, n. 50.*



or even to cancel the sale, if he has willingly and knowingly deceived the vendee (1).

The principal obligation of the vendee is to pay the purchase-money (2), with interest from the time of default (3): and also to compensate the vendor for the necessary expenses he has incurred since the sale, in respect of the property sold (4).

The effect of a purchase and sale of an inheritance is not so much that the particular goods which belong to it, as that the whole right in general of the vendor to the inheritance, as it existed at the time of the sale, is at once transferred to the vendee (5); while the vendee, besides the payment of the purchase-money, is bound to indemnify the vendor against all the claims of the creditors of the estate, who, notwithstanding the sale, remain entitled to have recourse to the vendor (6). Whenever a right of action or claim against a third person is sold, the vendor must give the vendee *cession of action* and *procuratio in rem suam*, i.e., he must transfer his right of demand to the vendee and give the latter an irrevocable power of attorney to make the claim for his own benefit (7).

Sometimes the obligations of vendor and vendee undergo particular modifications in consequence of

(1) *t. t. ff. de ædil. edict.* This action is called *actio redhibitoria et quanti minoris*.

(2) *L. 13, § 20, ff.; L. 6, L. 13, C. de act. empt.*

(3) *L. 19, ff. de per. & comm. rei vend.; L. 13, L. 15, C. de act. empt.*

(4) *L. 13, § 22; L. 38, § 1, ff. de act. empt.*

(5) *L. 2, § 1, ff. de her. vel. act. vend.*

(6) *L. 2, C. eod.; L. 2, C. de legat.; Sande, Decis. Lib. 3. tit. 4, def. 3.*

(7) Voet, *ad tit. ff. de her. vel. act. vend. n. 9, et seqq.*

stipulations which are annexed to the contract (1), and which give it a particular form, as far as they are not improper, nor altogether repugnant to the nature of the transaction (2).

Just as everything which happens before the sale falls to the profit and loss of the vendor (3), so everything falls to the profit and loss of the vendee after the sale has been completed by mutual consent (4), even although the property has not been delivered (5). This, however, is subject to some exceptions: *a*, in the case of the sale of things which have first to be weighed, counted or measured (6); *b*, in case any damage has happened to the property sold through the neglect or fault of the vendor (7); *c*, in case the damage has been caused by a defect which already existed in the property before the sale (8); *d*, in case a special stipulation with respect to the profit and loss has been annexed to the contract (9).

## SECTION X.

Purchase and sale, having once taken place, is rescinded in various ways. How a sale is rescinded.

(1) *L. 41, pr. ff. de contr. empt.*; *L. 14, C. de resc. vend.*; *L. 48, ff. de pact.*; *L. 8, C. de pact. int. empt. & vend.*

(2) *L. 13, § 26, ff. de act. empt.*; *L. 42, L. 52, ff. de contr. empt.*

(3) *L. 44, L. 57, L. 58, ff. de contr. empt.*

(4) § 3, *Inst. de empt. & vend. t. t. ff. & C. de per. & comm. rei vend.*; De Groot, *Intro. 3 B. 14 D. § 34.*

(5) *L. 62, § 2, ff. de contr. empt.*; *L. 30, pr. ff. de act. empt.*; *L. 4, L. ult. C. de per. & comm. rei vend.*

(6) *L. 1, § 1*; *L. 5, L. 15, ff. de per. & comm. rei vend.*

(7) *L. 14, pr. ff.*; *L. 4, L. 6, C. eod.*; *L. 35, § 4, ff. de contr. empt.*; *L. 36, L. 54, pr. ff. de act. empt.*

(8) *L. 15, ff.*; *L. 6, C. de per. & comm. rei vend.*

(9) § 3, *Inst. de empt. & vend.*; *L. 1, pr. ff. de per. & comm. rei vend.*; *L. 35, § 4, ff. de contr. empt.*

1st. When vendor and vendee release each other by mutual consent (1). But if delivery has already followed the sale, it would be a new contract of sale; and therefore, if the property be immovable, the duty of the fortieth penning (2½ per cent.) would have to be paid again to the Government (2).

2nd. If the property sold has such a defect, unknown to the vendee, that if he had known it the sale would not, for that reason, have taken place (3).

3rd. If the vendor or vendee has been prejudiced in respect of the price to the extent of more than half (4): i.e., if something worth 100 guilders is sold for 45; or, *vice versâ*, if something worth 45 guilders is sold for 100 (5). The rescission, however, for this reason, does not take place when one is prepared to increase or reduce the price to the true value (6).

4th. If any property is sold for cash, and payment does not follow, the vendor is at liberty to reclaim the property sold, and thus to rescind the sale (7).

5th. If the property is sold on this condition (*lit. footing*), that it shall be deemed unsold if within a certain fixed time a higher bid shall be made, or if the purchase-money is not paid within a certain fixed time (8).

(1) *L. 35, ff. de Reg. Jur.*; *L. 5, § 1, ff. de resc. vend.*

(2) *L. 58, in fin. ff. de pact.*; *Ordonn. op den 40sten penning van 9 May, 1744, Art. 7.*

(3) *t. t. ff. de ædil. edict.*; *De Groot, Intro. 3 B. 17, D. § 4.*

(4) *L. 2, L. 8, C. de resc. vend.*; *De Groot, Intro. 3 B. 17 D. § 5, and 52 D.*

(5) *J. Averanius, Interpr. Jur. Lib. 3, C. 7.*

(6) *d. L. 2, C. de resc. vend.*

(7) *Vide supra, p. 49.*

(8) *t. t. ff. de in diem addict.*; *t. t. ff. de leg. commiss.*



6th. If some one afterwards comes forward and proves a right of ownership or other real right in the property sold (1). In this case the vendor must *warrant*\* the property sold (2); and therefore he must take up the cause for the vendee, and if the property is adjudged to another person he must return the purchase-money with interest to the vendee, with compensation for the damage sustained and suffered by him (3).

## SECTION XI.

The contract of *hiring* and *letting* stands in a very close relation to purchase and sale. By this is understood the transaction by which the one party binds himself to let the other have the use of a certain thing for a fixed time in consideration of a certain rent, which the other binds himself to pay to him (4).

The requisites for the existence of this contract are:—

1st. A thing capable of being let on hire, whether movable or immovable, corporeal or incorporeal; as in the farming of tolls and duties. It must afford a certain enjoyment or use to the lessee, which is usually determined by the instrument of lease, which

(1) *t. t. ff. & C. de eviction.*

\* The expression "*vrijen en waaren*," free and warrant, means to secure to the purchaser or cessionary the full and lawful property of the thing ceded, to insure or indemnify him against eviction, or to warrant and hold him harmless against all demands or claims which a third person may make and sustain to the property sold or transferred in all time to come (*Ten. Not. Man. p. 180*).—TR.

(2) De Groot, *Intro. 3 B. 14 D. § 6*.

(3) *L. 8, L. 51, § 3; L. 60, L. 66, § ult.; L. 70, ff.; L. 9, L. 16, L. 17, L. 21, L. 23, L. 25, C. de evict.*

(4) *t. t. ff. & C. locat. cond.*



must therefore serve as a guide in that respect: e.g., land which is let as hay-fields may not be ploughed and sown (1). The use of a thing is not parted with for an unlimited but for a certain time. When the time is to last longer than twenty-five years, the lease must be judicially executed, and the duty of the fortieth penning ( $2\frac{1}{2}$  per cent.) must be paid (2).

2nd. A fixed rent, consisting generally of money (3); although sometimes the payment of a part of the fruits takes the place of the rent (4).

3rd. The mutual consent of lessor and lessee (5). In the letting of houses (6) and land (7), however, the consent must be contained in writing, and thus a lease with a proper stamp must be signed.

## SECTION XII.

Effects of  
letting and  
hiring.

The following obligations flow from the contract of letting and hiring—

On the part of the lessor:

1st. To deliver the thing hired to the lessee at the time fixed, in order that he may have the use of it (8). For this purpose consequently the lessee has an action against the lessor (9), which also includes a claim for

(1) De Groot, *Intro.* 3 B. 19 D. § 14, and the notes thereon by Groenewegen.

(2) *Plac. op den. 40sten penning van 9 Meij, 1744, Arts. 9 and 19.*

(3) § 2, *Inst. de loc. cond.*

(4) L. 19, § 3, *ff. loc. cond.*; L. 18, L. 21, C. *eod.*

(5) L. 1, L. 2, *ff. eod.*

(6) *Ord. van't Zegel*, 11 Sept. 1794, Art. 61.

(7) *Plac. of Emp. Chas.* 22 Jan. 1515; *Pol. Ord. Art.* 31; *Plac.* 26 Sept. 1658, and 24 Feb. 1696.

(8) L. 9, *pr. ff. loc. cond.*

(9) *Actio conducti.*

damages whenever the property leased is not delivered through the act, default or negligence of the lessor (1).

2nd. Not to obstruct the lessee in the enjoyment of the property leased, and to warrant him against the obstruction of others (2).

3rd. To maintain the property leased in a proper condition, so that the lessee may have the proper use thereof (3).

4th. To compensate the lessee for damages caused to him by substantial defects in the property leased (4).

5th. To perform the special stipulations which the contract of lease may contain (5).

On the other hand, the obligations of the lessee consist:

1st. In the punctual payment of the rent according to the terms stipulated for, or according to such as the local customs require (6). The lessee may demand a remission of the whole or of a part of this rent, if during any time he has not been able either wholly or partially to have the use of the property leased (7); unless the hindrance has been caused by his own act (8). This rule also applies to the case where any unfruitfulness is caused by inundation, heavy thunderstorms, and such like unforeseen misfortunes (9). The lessee is further bound :

(1) *L. 7, L. 8, L. 9, pr. ff. d. t.*

(2) *L. 33, L. 34, L. 35, ff. d. t.*

(3) *L. 30, pr. ff. eod.*

(4) *L. 19, § 1, ff. eod.*

(5) *L. 23, ff. de Reg. Jur.*

(6) *L. 17, C. de loc. cond. ; L. 1, § 4, ff. de migr. ; L. 34, ff. de Reg. Jur.*

(7) *L. 24, § 4, ff. loc. cond.*

(8) *L. 155, pr. ; L. 203, ff. de Reg. Jur.*

(9) *A. van Wezel, Tract. de remiss. merced. ; Voet, ad tit. ff. loc. n. 24 and 25.*

2nd. Not to use the property in any other way than that for which it was let to him (1).

3rd. To take care that the property remains in a proper condition, and is not misused.

4th. To return the property uninjured to the lessor at the expiration of the lease (2).

5th. To perform the particular obligations required by the local customs or by the stipulations in the contract of lease. For all this an action lies for the lessor against the lessee (3).

Among the special effects of this contract are :

That the lessor has a *tacit mortgage* and *preferent claim* for his rent upon the fruits produced by the property, and upon the movable property brought upon the premises (4), which he may also secure to himself by means of an *arrest* upon the fruits and movable property.

The contract of hire is rescinded :

*a.* When the time expires for which it was contracted.

*b.* When the property leased is destroyed by an unforeseen misfortune, e.g., when a house which has been hired is burnt (5).

*c.* When the lessee becomes the lessor's heir (6).

*d.* When the lessor absolutely requires the property himself (7).

(*e*) Although death does not put an end to the

(1) *L. 3, C. de loc. cond.*

(2) *L. 48, § 1, ff. ; L. 32, L. pen. C. cod.*

(3) *Actio locati.*

(4) *Vide supra, pp. 92-94.*

(5) *L. 9, § 1, ff. loc. cond.*

(6) *L. 75, L. 95, § 2, ff. de solut.*

(7) *L. 3, C. de loc. cond.*

contract of hire (1), yet it does not in case of insolvency continue beyond the first ensuing usual period of removing (2).

The contract of hire does not become void by the sale of the property leased, as the rule, *hire goes before sale*, prevails in our law (3).

The contract of hiring and letting is not confined merely to property, but it often also relates to work and labour: e.g., if I give a silversmith my silver, out of which to make a pair of candlesticks for me, or if I give a tailor my cloth, out of which to make a coat for me, this is a contract for the hiring of his labour, for which I pay him certain wages (4). The hiring of *domestics* specially appertains to this head, against whose misconduct provisions have been made by the local statutes of most towns (5).

### SECTION XIII.

The contract of *quit-rent grant* very much resembles sale, and also hire. The right of quit-rent <sup>grant.</sup> itself is a sort of imperfect ownership, and therefore a *real right* (6), but the contract by which this right is granted induces personal obligations.

The quit-rent tenant is entitled to take the fruits of the quit-rent land in the same manner as a usufructuary; and in the same manner pays all the charges

(1) § *ult. Inst. L.* 19; § 8, *ff. L.* 10, *C. loc. cond.*

(2) V. D. Keessel, *Thes.* 676.

(3) De Groot, *Intro.* 3 B. 19 D. n. 59.

(4) § 4, *Inst. de loc. cond.*

(5) De Groot, *Intro.* 3 B. 19 D. § 13; V. D. Keessel, *Thes.* 679.

(6) Voet, *ad tit. ff. si ager vectig. n.* 4.



on it (1). The grantor of the quit-rent is entitled every year to demand the rent which has been stipulated for in the deed of grant as an acknowledgment of the direct ownership (2). If the quit-rent tenant is in default with the rent for three years, the quit-rent is forfeited to the owner (3).

The contract of *societies*, or *partnership*, ought to follow next, but as we have set apart the *last Book* of this work for everything that specially relates to commerce, we refer the reader to that Book, where we shall also treat of bills of exchange, charterparties, bottomry, insurance, and other subjects of this nature.

#### SECTION XIV.

##### Mandate.

The contract of *mandate* is of frequent occurrence in society, and by it is understood the transaction by which a person commits the management of one or more of his affairs, in his stead and on his account, to another person, who charges himself gratuitously therewith, and binds himself to render an account (4).

The requisites for the existence of this contract are:

1st. Some matter which has still to be performed (5), not contrary to law or *contra bonos mores* (6), nor utterly uncertain as regards definiteness; of such a nature

(1) Voet, *ad d. t. n.* 11 and 12.

(2) *L. 2, C. de jur. emphyt.*

(3) De Groot, *Intro.* 2 B. 40 D. § 19; *Regts. Obs.* 4 D. *Obs.* 31; V. D. Keessel, *Thes.* 383.

(4) *t. t. Inst.* 1, ff. & *C. mand.*

(5) *L. 12, § 14, ff. mand.*

(6) *L. 6, § 3; L. 12, § 11, ff. eod.*

that it is capable of being performed by the mandator himself (1); for the execution of which the mandatory is a fit person; and in which the mandator or a third person has some interest (2).

2nd. That the mandator and mandatory have the intention of binding themselves to each other as such, irrespective of the manner in which the consent is made known, whether verbally, by letter, by a signed power of attorney, etc. (3). Hence a clear distinction must be drawn between mandate and a mere recommendation or advice, which raises no obligation, unless it be coupled with fraud (4).

3rd. That the performance of the matter be undertaken gratuitously, otherwise it becomes a contract of the hire of services (5). Nevertheless it is not repugnant to the nature of a mandate to allow the mandatory some recompense or *honorarium* for his performance (6).

The obligations of the mandatory consist of the following: to execute the matter which he has once voluntarily undertaken to perform (7); to use the greatest possible care in the execution (8); to render an account of his management to the mandator; and to hand over everything which has come into his hands by reason of the mandate (9).

(1) *L. 10, § 4, ff. eod.*

(2) *L. 2, L. 6, § 4, ff. eod.*

(3) *L. 15, § 2, ff. eod.*

(4) *L. 2, § 6; L. 20, ff. eod.; L. 47, ff. de Reg. Jur.*

(5) *L. 1, § 4, ff. mand.*

(6) *L. 6, ff. eod.*

(7) *L. 5, § 1; L. 22, § 11; L. 27, § 2, ff.; L. 11, C. eod.*

(8) *L. 13, C. eod.*

(9) *L. 20, ff. eod.*

The mandator, on the other hand, is bound to save the mandatory harmless against all the disbursements he has made by reason of the mandate, provided the expenses have not been caused by his fault or negligence (1); and to guarantee him against all obligations which he has had to enter into in the performance of his mandate (2); provided that in all these cases the mandatory has not exceeded the limits of his mandate (3). In all these respects the law has given both contracting parties the necessary actions (4).

Mandate ends :

- a. By the death of the mandatory (5).
- b. By the death of the mandator (6).
- c. By such a change of condition of life that the mandator loses his *persona* (7).
- d. By a withdrawal or revocation of the mandate (8).

## SECTION XV.

Quasi-  
contracts.

Besides the contracts thus far mentioned, there are still some transactions which by their similarity to contracts cause similar obligations and actions to arise. These are called *quasi-contracts* (9). And to this class the following belong :—

I. The *undertaking* of the business of another with-

- (1) *L. 27, § 4; L. 52, L. 56, § 4, ff. eod.*
- (2) *L. 45, ff. eod.; L. 17, ff. de in rem verso.*
- (3) *L. 5, ff. mand.*
- (4) *Actio mandati directa et contraria.*
- (5) *L. 27, § 3, ff. eod.*
- (6) *L. 26, L. 58, ff.; L. 15, C. eod.*
- (7) *L. 21, ff. de procur.*
- (8) *L. 12, § 16, ff. mand.*
- (9) *t. t. Inst. de oblig. quæ quasi ex contr.*

out his mandate and without his knowledge (1), provided it be not against his will or against his prohibition (2). The owner has against such an undertaker, although not bound to him by any direct contract, an action for the rendering of an account and for compensation for any loss which may have been caused him by any neglect of the undertaker (3). On the other hand, the undertaker has a right to demand an indemnity from the owner for all the disbursements which the former has been put to for his advantage (4).

II. The *administration of a guardianship*: for although no contract, properly speaking, exists between the guardian and his ward, yet they are bound to each other—the guardian to render an account; the ward to save him harmless against all his disbursements (5).

III. *Community apart from contract* (6): thus heirs have an action against their co-heirs for the division and partition of an undivided inheritance which has fallen to their share (7). Thus the co-proprietors of one and the same property have an action against each other for the division of that property and for an account of the profits enjoyed and expenses incurred (8).

IV. The *acceptance of an inheritance*: this gives

(1) *t. t. ff. & C. de negot. gest.*; De Groot, *Intro.* 3 B. 27 D.

(2) *L. 40, ff. mand.*; *L. ult. C. de neg. gest.*

(3) § 1, *Inst. de oblig. quæ quasi ex contr.*; *L. 2, L. 23, ff. de neg. gest.*

(4) *L. 2, L. 27, ff. eod. d. § 1, Inst.*

(5) *Vide supra, pp. 38–40.*

(6) Pothier, *On Partnerships and Companies*, pp. 162, *et seqq.*

(7) *t. t. fam. ercisc.*

(8) *t. t. ff. comm. divid.*



legatees and fideicommissaries an action for the payment of the legacies and fideicommissa left by will or codicil (1).

V. The *payment of something for which one was not indebted*. This wrongful payment may be demanded back, provided it was not due at all, not even under a natural obligation, and provided that the payment was made under a mistake and in ignorance (2).

## CHAPTER XVI.

### ON OBLIGATIONS ARISING FROM CRIMES AND QUASI-CRIMINAL ACTS.

#### SECTION I.

Obligations  
arising from  
crimes.

ANOTHER source of obligations is *crime*, by which is understood a voluntary act or omission contrary to law, and for that reason punishable (3).

A twofold obligation arises out of crime: the one to suffer punishment, of which we shall treat in the *following Book*; the other to make good the injury occasioned by the crime; and from this latter view, as affording the basis of a civil action, crime is considered here.

For this purpose crimes may be divided into: those committed against *life*, against the *person*, against the *reputation*, and against the *property* of our fellow-creatures.

(1) § 5, *Inst. de oblig. quæ quasi ex contr.*; *L. 5, § 2, ff. de obl. & act.*

(2) *t. t. ff. de cond. indeb.*; De Groot, *Intro. 3 B. 30 D. §§ 4-18.*

(3) De Groot, *Intro. 3 B. 32 D. § 3.*

## SECTION II.

*Crimes against life*, or *homicide*, oblige the person who has committed homicide to compensate the widow or children who were accustomed to be supported by the labour of the deceased, for any loss of profit and damages, calculated by way of annuity (1). This action lies for them against all who have actually taken part in the commission of the deed or who were in the company of the person who committed homicide, although it cannot be exactly proved which of them gave the deadly blow (2). This action lies although the deadly blow was not given with a murderous intent but was caused by negligence: e.g., through the negligence or ignorance of a coachman (3). Homicide committed in self-defence or in perfect innocence bars this action (4).

Crimes against life.

## SECTION III.

*Crimes against the person*, i.e., wounding or maiming, give the wounded person an action for compensation for the surgeon's bill, damage and loss of profit; the pain and suffering, and also the disfigurement of the body, are together valued at a sum of money (5). If

Crimes against the person.

(1) De Groot, *Intro.* 3 B. 33 D. n. 5 and 6; *Holl. Cons.* 3 D. Cons. 168; Bort, *Nagel. Werk. L.* 4, tit. 2, p. 148, *seqq.* Voet, *ad tit. ff. ad Leg. Aquil.* n. 11, and *ad tit. ff. de acq. vel om. her.* n. 6.

(2) De Groot, *Intro.* 3 B. 33 D. § 4; *Regtsq. Observ.* 2 D. Obs. 86.

(3) De Groot, *d. l.* § 5.

(4) De Groot, *d. l.* §§ 7-9; *Regtsy. Obs.* 1 D. Obs. 92; 2 D. Obs. 87; 3 D. Obs. 95.

(5) De Groot, *Intro.* 3 B. 34 D. § 2; *Regts. Obs.* 3 D. Obs. 96; Voet, *ad tit. ff. si quadr. paup. fec.* n. 8, and *ad tit. ff. ad Leg. Aquil.* n. 11.

any one is wounded in a riot this action lies for him against every one who took part in it (1). Wounding in self-defence or by accident does not fall under the class considered here (2).

## SECTION IV.

Crimes against  
the reputation.

*Crimes against the reputation* also give rise to actions for reparation. To this class belong:—

1st. The action of *injury*, by which is understood all acts and words, with intent to injure, calculated to defame a person's reputation (3). Injuries are divided into those committed by acts and those committed by words, verbal or written (4). The injured person has, according to law, an action for the reparation of the insult, which must be *honourable* and *profitable*. *Honourable*, by praying in court for the forgiveness of the person injured, accompanied with the declaration that he is heartily sorry for what has happened, and that he considers the injured person a man of honour, against whose character he has nothing to say; and *profitable*, by payment of a certain sum to the poor (5).

2nd. The action arising out of the *deflowering* or dishonouring of a female, even if committed with her consent. On this account an action lies for her: *a*, to compel marriage, or for a reparation of her honour in

(1) De Groot, *d. l.* § 6; *Regts. Obs.* 2 *D. Obs.* 89, and 4 *D.* p. 255.

(2) De Groot, *d. l.* § 4.

(3) *L.* 3, § 1, *ff. de injur.*

(4) § 1, *Inst.*; *L.* 1, § 1, *ff. eod.*

(5) De Groot, *Intro.* 3 *B.* 35 *D.* § 2, and 36 *D.* § 3; Voet, *ad tit. ff. de injur. n.* 17.

money (1)—for this purpose she must be able to swear that she has never had carnal connection with any other man; therefore a widow who has cohabited cannot maintain this action (2)—the choice between the two alternatives of this action lies entirely with the man, if no espousals can be proved against him; *b*, for the payment of the lying-in expenses, and, in case of the death of the child, for the payment of the funeral expenses (3); *c*, for the payment of a reasonable maintenance for the benefit of the child (4). If the man will swear (which he is bound to do in all cases) that he never had any carnal connection with the woman, and she can produce no evidence to show why he should not be allowed to take the oath, his oath has the preference over hers (5). No further action lies against a married man, when she knew that he was married, than for the lying-in expenses and maintenance (*alimentatie*) (6).

## SECTION V.

*A crime against property* is committed when a person Crimes against  
property. *deprives* another of his property; thus thieves and robbers (besides the punishment affixed to their offence) are bound to restore the stolen or robbed property and to pay damages (7); or when a person

(1) De Groot, *Intro.* 3 B. 25 D. § 8, n. 17; Voet, *d. tit. ff. ad Leg. Jul. de adult.* n. 3.

(2) Voet, *ad d. t. n.* 4.

(3) De Groot, *d. l. n.* 19; Voet, *d. t. n.* 6.

(4) De Groot, *d. l. n.* 21; Voet, *d. t. n.* 6.

(5) De Groot, *d. l. n.* 22-24; Voet, *d. t. n.* 6.

(6) Voet, *ad d. t. n.* 4.

(7) *t. t. ff. de cond. furt.*



intentionally or through neglect *damages* another's property, whereby he becomes liable to make good the expenses, damages, and interest (1).

## SECTION VI.

Quasi-criminal  
acts.

Just as there are *quasi-contracts*, so there are *quasi-criminal acts*, as when some damage is caused to a person by an act of ours of such a nature that, although it does not constitute a punishable offence, it nevertheless makes us liable for damages on account of the accompanying negligence or inadvertence (2), e.g., when we carelessly pour or throw something out of an upper story of a house, whereby we damage another person's property (3); when a fire which has broken out in your house, through your negligence, is communicated to mine (4); or when the property of travellers is stolen from the master of a ship or innkeeper, through want of sufficient care and attention (5).

## CHAPTER XVII.

### ON THE VARIOUS KINDS OF EVIDENCE OF TRANSACTIONS.

#### SECTION I.

On evidence  
in general.

DISPUTES often arise in the dealings of men, whether consisting in agreements or in crimes, not so much as to the obligations and actions which flow from them

(1) *t. t. ff. ad Leg. Aquil.*; De Groot, *Intro.* 3 B. 37 D.

(2) *t. t. ff. de oblig. quæ quasi ex del.*

(3) *t. t. ff. de his qui effud. vel dejec.*

(4) *L. 27, § 8; L. 30, § 3, ff. ad Leg. Aquil.*

(5) *t. t. ff. naut. camp. stabul.*

by force of law, as to the facts themselves, owing of the different accounts as to what did or did not happen. The inquiry by whom and in what manner transactions must be *proved* therefore deserves a separate *chapter*.

As general rules on this point may be stated :

1st. The onus of proof is on him who affirms, not on him who denies something (1); a negative is generally, on account of its nature, incapable of proof (2).

2nd. The onus of proof is on the plaintiff, not on the defendant (3), who on failure of the proof of the plaintiff must be absolved, although he himself has not proved anything (4).

3rd. If the defendant makes use of an exception he must prove it as if he were a plaintiff (5).

4th. If the plaintiff and defendant both state a fact in a different way, the plaintiff must first prove that which he affirms (6).

5th. The judge must not decide upon the weight of evidence simply from the letter of the documents or the number of the witnesses, but he must form his judgment as to what he should deem true or untrue, proved or not proved, from a consideration, founded upon his knowledge of mankind, of the whole matter, and the special concurrent circumstances of the case (7).

The principal division of evidence is into *documents* and *witnesses*. To these must be added some others,

(1) *L. 2, L. 18, § 2, ff. ; L. 9, C. de probat.*

(2) *L. 23, C. eod. ; L. 10, C. de non. num. pec.*

(3) *L. 21, ff. ; L. 8, L. 23, C. de probat.*

(4) *L. 4, C. de edendo.*

(5) *L. 8, L. 19, L. 25, ff. ; L. 1, C. de probat.*

(6) *L. 21, ff. ; L. 2, C. eod.*

(7) *L. 3, § 2 ; L. 21, § 3, ff. de testib. ; L. 1, C. plus val. quod. ay.*

as *confession, presumption, judgment, and the oath*. Let us shortly run through them.

## SECTION II.

Documentary  
evidence.

The first kind of evidence is by means of *documents*. These are conveniently divided into *judicial, notarial, and underhand*.

The *judicial* documents are executed before two members of the bench and the secretary; thus in the High Court several deeds are passed before two commissioners and the registrar; in the lower courts before two judges (*schepenen*) and the secretary (1).

*Notarial* documents are passed before a notary and two witnesses. The notaries are appointed, after examination by the High Court as to their competency, upon letters of commendation by the magistrate of the place in which they intend to practise, and are sworn in by commissioners of the High Court (2); after which upon these *letters of appointment (creatie)*, the local magistrate grants them a *certificate of admission* (3), the effect of which is that they are only qualified to practise in the place where they reside (4).

*Underhand* documents are written either by the persons themselves who are interested in the matter, or by a third person by their order, and confirmed by the signatures of the contracting parties (5). With

(1) De Groot, *Intro.* 2 B. 17 D. § 17; S. Van Leeuwen, *Cost. van Rhijnl.* p. 351.

(2) *Reglem. voor 't Depart. Bestuur van Holland*, Art. 47.

(3) Lybregts, *Red. Vert. over 't Not. ambt*, 1 D. 1 H.; V. D. Schelling, *Hist. van 't Notarisschap*, C. 6.

(4) *Regs. Obs.* 1 D. Obs. 39, and 4 D. p. 405.

(5) Mattheus, *De Probat. D.* 4, n. 1.

regard to the weight of evidence of these different kinds of documents, the judicial and notarial documents, being *public instruments*, deserve most credence (1). As proof of genuineness, especially of the dates, they deserve to rank above underhand documents, although in other respects the latter are equally valid (2).

*Underhand* documents constitute *perfect* evidence *against* but not *in favour* of the maker (3); as the result would be dangerous if any one were able to produce notes made by himself as satisfactory evidence *in his own favour* (4).

Under public instruments may also be classed such as are generally known by the name of *records* (archives), whose evidence (provided the extracts and copies which are issued are confirmed by being certified and signed by the registrar or the keeper of the records) is very weighty; so much so, that underhand documents registered in the Records Office (Archives) acquire thereby the force of public instruments (5).

To the class of private documents which constitute evidence belong specially the *books of merchants*, provided they are properly kept and confirmed by the merchant on oath (6).

(1) Merula, *Manier van Proced. Lib. 4, tit. 66, C. 2.*

(2) Bynkershoek, *Quæst. Jur. Priv. Lib. 1, C. 6, p. 65, vs.* "Notarii duntaxat adhibentur propter lubricam private scripturæ fidem, et instrumenta, quæ scribunt, publicâ ubique auctoritate censentur."

(3) *L. 29, § ult. ff. depos.; L. 13, C. de non. num. pec.*

(4) *L. 5, L. 7, de probat.*

(5) Leyserus, *Medit. ad ff. Tom. 4, Spec. 266; Mattheus, De Probat. C. 3, n. 25.*

(6) Mattheus, *De Probat. C. 4, n. 68-82; De Haas, Aanteek. op Merula's Manier van Proced. L. 4, t. 66, C. 3, § 6; Voet, ad tit. ff. de fid. instr. n. 12*



The *Grossen*,\* or copies, issued by the secretary,† or notary of public instruments, and the originals of underhand instruments, must be produced (1). *Copies* are not admissible as evidence unless certified by a secretary or notary (2).

When the whole instrument is not required as evidence, a *certified extract* (*extract authentick*) may also be made (3).

### SECTION III.

Oral evidence. Another sort of proof is that by *witnesses*; a means of proof introduced merely by necessity (4), but which, by reason of the want of observation, partiality, and other defects of human nature, is in many cases most uncertain, so that with respect to the credibility of witnesses very much must be left to the judgment of the judges (5). Some persons, however, are absolutely *prohibited* by law from being witnesses; some may *excuse* themselves; and, lastly, some may be *challenged* or excepted to.

Among persons who are *prohibited* may be classed

\* A *Grosse* is a verbal copy, without abbreviation, of the original instrument.—Tr.

† The Registrar of some of the courts was so called.—Tr.

(1) Merula, *Manier van Proced.* L. 4, t. 66, C. 4, n. 2.

(2) *Ampl. Instr. van den Hove*, 21 Dec. 1579, Art. 17; S. van Leeuwen, *Manier van Proced. in de Steden en ten platten Lande*, Art. 18.

(3) Leijser, *Med. ad ff. Tom. 4, Spec.* 263. How very necessary it is to impress most earnestly upon notaries to avoid all slovenliness in the execution of certified copies, and in drawing certified extracts to make the abstracts with good judgment and all fidelity.

(4) L. 1, ff. *de testib.*

(5) L. 3, § 1; L. 13, ff. *eod.*; Leyserus, *Medit. ad ff. Tom. 4, Spec.* 283.

lunatics and idiots (1); persons who are both deaf and dumb (2); persons who have not yet attained the age of puberty, i.e., not yet fourteen or twelve years of age (3); also persons who have been declared dishonourable and infamous (4).

Persons may *excuse* themselves from giving evidence who are very closely related to each other by blood, e.g., parents against their children, a wife against her husband (5); persons who would by their evidence disclose their own disgrace or crime (6). An advocate or attorney may excuse himself from giving evidence of matters which he has discovered from his client in consultation, etc. A notary, however, cannot avail himself of this excuse; neither can a *doctor of medicine*, when called upon by the judge to give evidence as to the nature of a certain secret disease. Domestic servants may also be compelled to give evidence against their master or mistress, provided they themselves are not concerned in the cause (7).

Lastly, the challenges (exceptions to) of witnesses are of a various and manifold nature. Thus a witness is challenged: because the cause with respect to which he is a witness is his own, i.e., when he may derive some advantage or suffer some injury from his evidence (8); because they are relations by

(1) *L.* 20, § 4, *ff. qui test. fac. poss.*; § 8, *Inst. de inut. stip.*

(2) § 6, *Inst. de testam. ordin.*; *L.* 3, § 1, *ff. de testib.*

(3) *L.* 3, § 5; *L.* 19, § 1, *ff. eod.*

(4) *d. L.* 3, § 5; *L.* 13, *ff. eod.*

(5) *L.* 4, *L.* 5, *ff. eod.*

(6) Voet, *ad tit. ff. de testib. n.* 14.

(7) See on all these points our *Notes on Merula, Manier van Proced.* 2 *D.* p. 151.

(8) *L.* 10, *ff.*; *L.* 10, *C. de testib.*; *L.* 1, § 11, *ff. quand. appell. sit.*

blood or by marriage, or man and wife (1); because they are members of the same household as the person for whom they are witnesses (2); unless the dispute relates to matters which can be known to no other persons than to those who are of the same household (3); because the evidence bears signs of being given out of friendship or hatred (4); because the witness is a person of bad character, not deserving of credence (5); because he contradicts himself in his statement, is unintelligible, wants to press something as true which is manifestly false, or acts simply on what is said by others, without sufficient grounds of knowledge (6); because he is the only (*singuliere*) witness, whereas there ought always to be two to constitute proof (7); because the witness has not been sworn, and no opportunity has been afforded to the other side of cross-examination (cross interrogatories) (8). Very often something may be said on the other side against these challenges, which is termed *salvatie* (or a defence) (9); and then, finally, the judgment of the judge must decide, from the circumstances of the case which have been stated, upon the greater or less degree of credibility of the witnesses (10).

(1) *L. 4, L. 9, ff.; L. 6, C. de testib.*

(2) *L. 24, ff.; L. 3, C. eod.*

(3) *L. 8, § 6, C. de repud.*

(4) *L. 3, pr. ff.; L. 17, C. de testib.*

(5) *L. 3, § 5, ff. eod.*

(6) Merula, *Manier van Proced. L. 4, t. 78, C. 5.*

(7) *L. 9, § 1, C. de testib.*

(8) Voet, *ad tit. ff. de testib. n. 15.*

(9) Merula, *d. l. Tit. 79, C. 2-4.*

(10) *L. 3, § 1, ff. de testib.*

# SECTION IV.

The remaining sorts of proof, besides documents and witnesses, consist of the following:—

Confession,  
presumption,  
judgment,  
and oath.

1st. *Confession*. In order that the weight of perfect evidence may be attached to it, it must be voluntary, certain, and made before a judge. Extra-judicial confessions do indeed raise a presumption, but do not constitute proof (1).

2nd. *Presumption*: that is, a proof, or also an inference drawn from the circumstances, and in accordance with that which is of common occurrence (2). The presumption, as a rule, raises a supposition or probability, e.g., flight raises an inference of guilt (3); but there are also presumptions which constitute perfect proof, e.g., if a married woman is delivered of a child after her husband has been abroad for a year or more, this raises such a strong presumption of her having committed adultery as to admit of no proof to the contrary (4).

3rd. *Sentence or judgment*. This is deemed to be the truth if delivered in the proper form, and constitutes perfect proof between the parties (5); but not with regard to third persons who were not concerned as parties in the suit (6).

(1) Merula, *Manier van Proced.* L. 4, t. 62; Voet, *ad tit. ff. de confess.*

(2) Huber, *Hedend. Regtsg.* 5 B. 28 C. n. 1.

(3) Nov. 53, C. 4; Voet, *ad tit. ff. de probat. and præsumt. n. 5.*

(4) Voet, *ad d. t. n. 16.*

(5) L. 25, *ff. de stat. hom.*; L. 207, *ff. de R. J. L. pen. ff. de just. & jur.*

(6) *t. t. C. int. al. act. vel jud. al. non. noc.*; L. 2, *C. quib. res jud. non noc.*



Fourthly, and lastly, the *oath* is also a kind of proof. Parties often make use of it to perfect a proof which cannot be deemed conclusive, or to defend themselves against a presumption raised against them. Such a tender of oath does not, however, become evidence until the judge by his judgment has allowed one of the two parties to take it, and when such party has taken this oath, the statements thus sworn to are deemed to be proved as between the parties (1).

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## CHAPTER XVIII.

### ON THE MODES IN WHICH OBLIGATIONS ARE EXTINGUISHED.

#### SECTION I.

Payment. JUST as *real* rights are relinquished and lost in various ways (2), so the modes in which obligations and the *personal* rights flowing from them are extinguished are also of numerous kinds. Let us briefly run through them.

I. *Payment*, i.e., the actual fulfilment of that which one has bound oneself to give or to do (3). It is not necessary for the validity of a payment that it should be made by the debtor or by some one by his order, but, by whomsoever the payment is made, although he had no authority from the debtor, although he made the payment even against the wish of the debtor, provided he does it in the name and in discharge of

(1) Voet, *ad tit. ff. de jurej. n. 17, seqq.*

(2) Vide *supra*, pp. 26, 45, 49.

(3) *pr. Inst. quib. mod. toll. obl.*

the debtor, and provided he is capable of transferring the ownership in the thing paid, the payment is valid ; it causes the extinction of the obligation, and discharges the debtor even against his will (1). This, however, only takes place in payments which consist in *giving* something : because if an *act* is the subject of the obligation it may often make a great difference to the creditor by whom it is performed (2).

In order that the payment may be valid, it must be made to the creditor or to some one who has authority from him or is competent to receive it (3). If the creditor has left several heirs, no valid payment can be made to one of the heirs except for that portion of the debt which is due to him, unless he has been authorised by his co-heirs to receive the whole debt (4). If a debt is ceded to another, and notice of the cession is given to the debtor, the payment must be made to the cessionary, and it is no longer valid to make the payment to the former creditor (5). Sometimes the contract by which a person binds himself to pay something to another nominates a third person into whose hands it is agreed that payment may be made, just as if it were made to the creditor himself (6). Payment made to a person who is neither competent nor authorised to receive it becomes valid : *α*, when the creditor subsequently ratifies the payment (7) ;

(1) *L. 23, L. 40, L. 53, ff. de solut. ; L. 39, ff. de neg. gest.*

(2) *L. 31, ff. de solut.*

(3) *L. 12, L. 34, § 3, ff. eod. ; L. 180, ff. de Reg. Jur.*

(4) *L. 81, § 1 ; L. 104, ff. de solut.*

(5) Voet, *ad tit. ff. de her. vel act. vend. n. 15.*

(6) *L. 21, ff. de novat. ; Voet, ad tit. ff. de solut. n. 2.*

(7) *L. 12, § 4, ff. de solut. ; L. 12, C. eod. ; L. 24, ff. de neg. gest.*

*b*, when the sum paid has conduced to the advantage of the creditor (1); *c*, when the person to whom payment is made becomes the creditor's heir (2).

According to the general rule the thing itself which is due must be paid; and a debtor cannot oblige his creditor to accept anything else in payment than that which he owed him (3). No creditor is bound against his will to receive that which is due to him in portions, unless the contract provides for a payment by instalments (4).

The effect of payment is the extinction of the obligation and everything that pertains to it, as well as the release of all those who were debtors for it (5). This, however, is subject to an exception, when one of the debtors or sureties makes a payment which is accompanied by a *cession of the creditor's action* against the co-debtors or co-sureties (6).

Payment of a portion of that which is due extinguishes the debt *pro tanto*, and to that extent also stops the interest from running (7).

With respect to the appropriation of payments made, the following rules should be borne in mind:

1st. The debtor is entitled, when he makes payment to declare to which debt he wishes the sum paid to be appropriated (8).

2nd. If the debtor makes no appropriation on pay-

(1) *L. 28, L. 34, § 9, ff. de solut.*

(2) *L. 96, § 4, ff. eod.*

(3) *L. 16, C. eod.; L. 2, § 1, ff. de reb. cred.*

(4) *L. 41, § 1, ff. de usur.; L. 3, ff. fam. ercisc.*

(5) *L. 43, ff. de solut.*

(6) *L. 17, ff. de fidejuss.; L. 47, ff. locat.*

(7) *L. 9, § 1, ff. de solut.*

(8) *L. 1, ff. eod.*

ment, the creditor who has claims arising from different grounds may specify the appropriation in the receipt (1).

3rd. If the appropriation is not made either by the debtor or the creditor, it must be made to that debt in the discharge of which the debtor has most interest (2).

4th. If the debts are of the same nature, so that the debtor has no more interest in the payment of one than of the other, the appropriation must be made to the oldest debt (3).

5th. If the different debts are of the same date, and alike in every other respect, the appropriation must be made *pro rata* to each debt (4).

6th. In the case of debts which are of such a nature that they bear interest, the appropriation must first be made to the interest, and then to the principal (5).

*Consignation* of that which is due stands on the same footing as payment, if the creditor refuses to accept the payment tendered to him. The debtor is discharged thereby, and that which is paid into court lies at the risk and for the benefit of the creditor (6).

## SECTION II.

II. *Novation of debt*, i.e., the contraction of a new debt in place of the old one : either by the obligation Novation of debt.

(1) *d. L. 1, L. 2, L. 3, ff. eod.*

(2) *L. 3, § 1; L. 4, in fin.; L. 5, L. 97, L. 103, ff. eod.*

(3) *L. 5, L. 89, § 2, ff. eod.*

(4) *L. 8, ff. eod.*

(5) *L. 1, C. eod.; L. 5, §§ 2 and 3; L. 6, ff. eod.; L. 35, ff. de pign. act.; L. 21, C. de usur.*

(6) *Voet, ad tit. ff. de solut. n. 29.*



being changed by the same debtor for the benefit of the same creditor into another kind of obligation (1); by a new debtor taking my debt entirely upon himself (2); or by a debtor contracting, by order of the original creditor, and in order to be released from him, an obligation for the benefit of a new creditor (3).

The expressly declared wish of the creditor to create a novation is necessary for a novation. No novation may be inferred from conjectures and suppositions, but the newly contracted obligation is much rather deemed to have been made in order to strengthen the first one, and for the purpose of being annexed to it, than for the purpose of extinguishing it (4).

The effect of novation is that the original debt is extinguished in the same manner as by actual payment. Consequently it annuls the mortgages (hypothecs) which were given as security for it, unless they are expressly transferred to the second debt; and the sureties for the original debt are not liable for the new one unless they expressly agree to it (5).

### SECTION III.

Release.

III. *Release of the debt.* This may take place not only by an express but also by a tacit agreement, arising from certain acts which raise the presumption of such an agreement. For example, if the creditor

(1) *L. 1, ff. de novat. & deleg.*; § 1, *Inst. quib. mod. toll. obl.*

(2) *L. 7, § 8, ff. de dol. mal.*; *L. 4, ff. de cond. caus. dat.*

(3) *L. 11, ff. de novat. & deleg.*; § *pen. Inst. quib. mod. toll. obl.*

(4) *L. ult. C. de novat.*; C. Walchius, in *Introd. in Controv. Jur. Civ. Sect. 3, C. 8, § 7.*

(5) *L. 18, ff. de novat.*; *L. 12, § 5, qui potior.*

gives back to the debtor his written obligation or acknowledgment of debt, he is presumed to have discharged him from the debt (1).

The giving back, however, of property pledged for a debt does indeed give rise to a presumption that the pledge is extinguished, but not that the debt itself is released (2).

Releases are of various kinds: sometimes the entire debt is considered to be released, and all who were debtors for it discharged (3); sometimes it only extends to one of the debtors, and his co-debtors are not thereby discharged (4). Thus, if there are two or more debtors *in solidum*, the release granted to one does not extinguish the debt; it only discharges him, and not his co-debtor. A release granted to the principal debtor induces that of the surety, but not *vice versâ*, since the release granted to a surety does not discharge the principal debtor, any more than a personal release granted to one surety discharges his co-sureties (5).

No one but the creditor, if he has the power of disposing of his property, can grant a release of a debt, except a person who has been specially authorised by him to give such release. A person under a general power of attorney, a guardian, a curator, or an administrator, has no such right; because all these persons have only the power of administrating, and not of giving away (6).

(1) *L. 2, § 1, ff. de pact.*

(2) *L. 3, ff. eod.*

(3) *L. 21, § ult.; L. ult. ff. de pact.; L. 7, § 1, ff. de except.*

(4) *L. 7, § 8; L. 17, § 3; L. 25, § 1, ff. de pact.*

(5) *L. 23, ff. de pact.; L. 15, § 1, ff. de fidejus.*

(6) *L. 37, ff. de pact.; L. 22, ff. de adm. tut.*

## SECTION IV.

Set-off.

IV. *Set-off*, by which is understood the extinguishing of debts which two persons mutually owe each other by means of the claims which they mutually have against each other (1): e.g., if I owe you a sum of 500 guilders on account of money lent, and if, on the other hand, I am your creditor for a like sum of 500 guilders for arrears of rent, then my debt to you, by virtue of the law of set-off, is extinguished, because I have a claim against you for a like amount; and, *vice versâ*, the debt for which you are liable to me is extinguished by the claim which you have against me.

In order that a debt may be set-off it is necessary :

1st. That the thing due is of the same kind as the subject of the debt against which it is set-off: e.g., money may be set-off against money, but not money against grain (2).

2nd. That the debt which is set-off is of such a nature that the time of payment has arrived (3).

3rd. That the debt which is set-off is liquid (4).

4th. That the debt is due to the person himself who claims the set-off (5).

5th. That the debt which is set-off is due by the person himself against whom it is set-off (6).

The effects of set-off by operation of law (7) are :

(1) *L. 1, ff. de compens.*

(2) *L. 10, § 2; L. 11, L. 12, ff.; L. 4, L. 8, C. eod.*

(3) *L. 7, ff. eod.*

(4) *L. ult., § 1, C. eod.*

(5) *L. 9, C. eod.*

(6) *L. 23, ff. eod.*

(7) *L. 21, ff.; L. ult., C. eod.*

1st. If my creditor, with whom I have pledged movables, becomes my debtor, I can demand these movables back, provided I offer him the balance due by me (1).

2nd. If one debt bears interest and the contra debt does not, the debts are nevertheless cancelled by way of set-off to the extent to which they are of the same amount, and from that day and to that extent interest ceases to run (2).\*

3rd. Although my creditor cannot be obliged to accept part payment from me, yet if he has become my debtor for a smaller amount than that which I owed him, he is obliged to allow the partial discharge of his debt; which in this case takes place by operation of law by virtue of set-off (3).

4th. If a person has paid a debt which was already *ipso facto* extinguished by set-off, he can demand back the money as not being due (4), unless such payment was made in satisfaction of a judgment (5).

## SECTION V.

V. *Merger*: i.e., when the characters of creditor and debtor of one and the same debt are united in the same Merger.

(1) *L. 12, C. eod.*

(2) *L. 11, ff.; L. 4, C. eod.*

\* I.e., if the one debt bears interest and the other does not, and they are of the same amount, they are cancelled, and no interest runs (*D. 16, 2, 11*); but if the debt bearing interest is greater than the other, the former is reduced by the amount of the latter, and only the residue bears interest (*C. 4, 31, 4*).—Tr.

(3) *d. l. 4.*

(4) *L. 10, § 1, ff. eod.*

(5) *L. 2, C. eod.; L. 1, C. de cond. indeb.*



person: e.g., when one becomes the other's heir (1). In this way also the obligation of a surety is extinguished (2), because if the principal debt no longer exists, the collateral (or accessory) debt also cannot exist (3). But the principal debt does not become extinguished if the creditor becomes the heir of the surety, or the surety the heir of the creditor (4). In order that this merger may take place, the creditor or debtor must be such of the *entire* debt, because if he is such only of a part, merger only takes place as to that part; so also if he becomes heir only of a part, the debt as regards his co-heirs continues to exist to the extent of their portions (5).

## SECTION VI.

Destruction of  
subject-  
matter.

VI. *The destruction of the thing which is due extinguishes the obligation* (6), provided it is entirely destroyed, and without the act or default of the debtor (7). If the destruction has been caused by his fault, both he, as well as his heirs and sureties, are bound to make good the value (8).

(1) *L. 95, § 2; L. pen. in fin. ff. de solut.*

(2) *L. 38, § 1, ff. de fidej.; L. 34, § 8; L. 71, ff. de solut.*

(3) *L. 129, § 1, ff. de Reg. Jur.; L. 2, ff. de pecul. leg.*

(4) *L. 71, ff. de fidejus.*

(5) *L. 50, ff. de fidejus.; L. 1, C. de hered. act.*

(6) *L. 33, L. 57, ff. de verb. obl.*

(7) *L. 82, § 1; L. 91, § 2, ff. eod.*

(8) *L. 91, §§ 4, 5, ff. eod.; L. 58, § 1, ff. de fidejus.; L. 24, § 1, ff. de usur.*

## SECTION VII.

VII. *The expiration of the time* for which the obligation was entered into: e.g., if I have become surety for a person on condition that I should not be liable for more than three years (1). Hereto appertain also all loans of money made upon life annuities determinable upon the death of the borrower, or of the person for whose life the annuity has been granted, upon which (i.e., death) they are *ipso facto* extinguished (2).

In like manner, if an obligation is entered into on condition that it shall not last longer than the actual happening of a certain event: e.g., if I become surety for a person until the safe arrival of a certain ship in which he has great interest, the arrival of the ship *ipso facto* extinguishes the obligation (3).

## SECTION VIII.

VIII. *Prescription* also extinguishes obligations in such a way that after the expiration of the time fixed by law as the period of prescription, the judge ought to declare that the plaintiff cannot be heard (lit., is not admissible) (4). By our laws the period of prescription is generally fixed at a *third of a century* (5); though there are jurists who consider a prescription of thirty

(1) *L.* 44, §§ 1, 2, ff. *de obl. & act.*; *L.* 56, § 4, ff. *de verb. obl.*

(2) De Groot, *Intro.* 3 B. 14 D. § 20.

(3) *L.* 59, § 5, ff. *mand.*

(4) De Groot, *Intro.* 3 B. 46 D. § 2; *Regts. Obs.* 2 D. *Obs.* 97.

(5) Matthæi, *Paroem.* 9; Loenius, *Decis. and Obs. Cas.* 76.

years sufficient in personal actions (1). In the case of annual rents, the mere lapse of thirty years, within which no rents have been demanded, is not sufficient to release the debtor in respect of those annual rents which have not yet been due for thirty years; but as many prescriptions are necessary as there are annual payments (2).

## SECTION IX.

Accord.

IX. *Transactio* or *accord* extinguishes the obligation, in respect of which the accord is made, to the extent to which it previously existed; as an accord is placed on the same footing in respect of its effects as a judgment in which both parties have acquiesced (3).

## SECTION X.

Restitution.

X. *Relief*, or *restitutio in integrum*, extinguishes the obligation against which a person is relieved (4). This is granted by virtue of letters patent, issued by the High Court of Justice (*Mandamenten van Relief*, or *Requesten Civiel*), by the judge of the domicile (lit., *daily*), after a previous action at law and a proper inquiry into the matter (5): provided there are lawful reasons for this course, which in law are limited to fear or violence, fraud, minority, absence, excusable mistake, suffering damage to the extent of more than the half,\*

(1) Bynkershoek, *Quæst. Jur. Priv. Lib.* 2, C. 15, *in init.*

(2) V. D. Keessel, *Thes.* 875.

(3) L. 2, ff. *de jurej.*; L. 20, C. *de transact.*

(4) Voet, *ad tit. ff. de int. rest. n.* 21.

(5) Vide my *Verhand. over de Judic. Pract.* 4 B. C. 1.

\* *Læsio enormis*.—TR.

and further, to all such equitable grounds according to which the transaction \* ought not to continue to exist(1).

## SECTION XI.

XI. *Cessio bonorum*, or the surrender of one's estate, *Cessio bonorum*, may also be classed among the modes of extinguishing obligations, in so far that the debtor who has obtained a writ of *cessio bonorum* (*Brieven van Cessie*), and has had it confirmed by the judge of the domicile (2), is no longer liable to his creditors unless his pecuniary circumstances should afterwards improve (3).

Lastly, some persons include *judgments* and the *oath* among the modes in which obligations are extinguished, but less accurately: for although both undoubtedly afford an exception to the person, who is notwithstanding sued upon the obligation (4), yet they tend much rather to prove that the obligation, upon which the plaintiff was nonsuited, never existed.

\* Against which relief is sought.—Tr.

(1) *D. D. ad L. IV. Digest*; De Groot, *Intro.* 3 B. 48 and 52 D.

(2) Vide my *Verhand. over de Jud. Pract.* 2 B. C. 31.

(3) *L. 4, Pr. ff. de cess. bon.*; De Groot, *Intro.* 3 B. 51 D. § 6.

(4) De Groot, *d. l.* 49 and 50 D.



## BOOK II.

### ON THE CRIMINAL LAW.

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#### CHAPTER I.

##### ON CRIMES IN GENERAL.

###### SECTION I.

Crimes and  
their classi-  
fication.

By crimes are understood the voluntary and injurious acts which are not only contrary to law, but to which also punishments are affixed by law. They are committed *fraudulently* or *intentionally*, and these deserve most to be punished ; or through *negligence*, and these are less punishable ; or by *mischance* or *accident*, and the person who commits such acts cannot be charged with them as crimes (1).

###### SECTION II.

Perfect and  
imperfect  
crimes.

In all crimes one must consider whether the party \* has so far completed the act that nothing in his opinion remains to complete the crime purposed by him, or whether such is not the case. Hence the division of crimes into *perfect* and *imperfect* crimes. As to the latter, one must moreover consider whether the crime consists only in the intention of the party ;

(1) J. C. von Quistorp, *Grundsätze des Deutschen Peinlichen Rechts* (*Principles of the German Criminal Law*), 1 Th. § 25.

\* Lit., the person committing the act.—Tr.

next, whether this intention has been manifested by any overt act (lit., actually commenced commission); and, if so, to what extent (1).

It is also of importance to consider whether the party has followed up the commission of the crime by subsequent acts, and also whether he has *repeated* the crime committed once before.

### SECTION III.

In considering who is or is not to be regarded as a criminal, the following points deserve to be observed:—

What constitutes a criminal.

I. Every crime presupposes the existence of a *law*, which affixes a punishment to its commission. If none exist, a crime is out of the question, even although such an act may be prohibited under severe punishment in other countries (2).

The penal law.

II. The mere *intention* of committing punishable offences does not constitute the crime itself (3), unless it be accompanied by overt acts, properly proved and not merely conjectured. But if it has been accompanied by such acts, it is then proper to consider with what object were they committed (4), inasmuch as the intention or the consciousness that one is committing a crime really constitutes the criminality (5). This intention is inferred from the act itself, and innocence must be proved *aliunde* (6). Just as there are degrees

Intention to commit a crime.

(1) Boehmer, *Ad Const. Crimin. Carol. ad Art. 131*, § 38, and *Art. 178*, § 6.

(2) Quistorp, § 32.

(3) *L. 18, ff. de poen.*; *L. 225, ff. de verb. sign.*

(4) *L. 41, In fin. ff. ad Leg. Aquil.*; *L. 39, L. 53, Pr. ff. de furt.*; *L. 79, ff. de Reg. Jur.*

(5) *L. 4, § 1*; *L. 7, ff. ad Leg. Corn. de sicar.*; *L. 1, L. 5, C. eod.*

(6) *L. 1, C. ad Leg. Corn. de sicar.*; *L. 5, C. de injur.*

of negligence, so there are degrees in the wickedness of the intention of the criminal; and in determining the punishment the judge should carefully take this into consideration (1).

Crime through  
negligence.

III. If a crime has its origin not so much in the will and intention (of the party) as in the want of proper judgment and carefulness, it is termed a *crime through negligence*. If a crime is punishable with death or corporal punishment, intention and negligence must be carefully distinguished from each other (2), because crimes committed through negligence can never be punished with death, and very seldom with the ordinary corporal punishments (3).\*

Crime com-  
mitted by  
accident.

IV. If the crime has its origin neither in the intention nor in the carelessness of the party, but in mere mischance, and the act † is therefore purely *accidental*, all liability is gone, and punishment cannot be inflicted any more than damages (4).

#### SECTION IV.

Insanity.

V. A person wanting in *intellect and will* is not liable for the crimes which he commits while in this condition. Crazy and mad persons and idiots cannot therefore be punished (5). With respect to this point it

(1) G. Fielangirie, *Science de la Législation*, Tom. 4, C. 14.

(2) *L.* 4, § 1; *L.* 7, ff.; *L.* 1, *L.* 5, *C. ad Leg. Corn. de sicar.*

(3) Boehmer *ad* Carpzovii, *Prax. Crim. Quæst.* 27, *Obs.* 1.

\* As to exact meaning of *lyfstraff*, vide *infra*, p. 188.—Tr.

† The text says "crime."—Tr.

(4) § 5, *Inst. L.* 31, *L.* 51, ff. *ad Leg. Aquil.*; Boehmer, *ad Const. Crim. Carol. Art.* 146.

(5) *L.* 12, ff. *ad Leg. Corn. de sicar.*; *L.* 13, *L.* 14, ff. *de offic. Præsid.*; *L.* 40, ff. *de Reg. Jur.*; *L.* 9, § 2, ff. *ad Leg. Pomp. de parric.*

is the duty of the judge carefully to ascertain whether this defect of mental capacity excludes all intention in the party of committing a crime; and, above all, whether the party has at times lucid intervals, in order to determine thereby whether there is any reason for inflicting the usual or an exceptional punishment (1).

VI. Mad persons and idiots must not be confounded with silly people and persons of *stunted intellect*; i.e., not persons who are so-called *childish*, because they also may often be classed with insane persons (2); but the *silly, innocent, stupid* persons, strictly speaking, who form a kind of intermediate class between childish and sensible people. These persons are capable of committing true crimes, and may be punished with death or corporal punishment, according to the circumstances; because in the commission of crimes the question is not so much as to a clear intellect and accurate knowledge of the laws, but merely as to the consciousness that the act is illegal and punishable (3). Nevertheless this simplicity, provided it is properly proved, is a strong ground for defence, even in crimes punishable with death, and above all in such crimes as have their origin in negligence, or in which the circumstances do not disclose any special intention or deliberation (4).

VII. It is more difficult to determine to what extent *Melancholy*. *melancholy* or *gloomy* persons are entitled to be exculpated. In general, too much allowance should not be

(1) Matthæus, *de Crim. in Proleg. Cap. 2, n. 6.*

(2) Quistorp, § 39.

(3) Leyser, *Med. ad Pand. Tom. 9, Spec. 599.*

(4) *Ibid. d. l.*; Quistorp, § 39.



made, if these persons are, with the exception of their gloominess, in possession of their senses; but, nevertheless, there is no doubt that persons may suffer from melancholy or dejection to such a great extent, that they must be regarded as actually insane, and they are not liable for crimes committed by them while in that condition. Such persons, however, are sentenced to imprisonment in order to prevent accidents (1). A distinction must also be drawn between these *melancholy* persons and persons who, owing to some sorrow in life, commit a crime, and on whom the ordinary punishment for the crime should be inflicted (2).

Deafness and  
dumbness.

VIII. *Deafness* and *dumbness* may also be taken into consideration in fixing persons with criminal liability, if they are born with these infirmities, and there is reason to doubt the possibility of a wicked intention. It is best to confine such persons for the future in prison for life, in order to prevent crimes. But if the person who committed the crime has become deaf or dumb by accident, and there is satisfactory evidence of his wicked intention, he is undoubtedly liable to punishment according to law (3).

## SECTION V.

Drunkenness.

IX. *Drunkenness* being in itself an offence, nay even punishable in the case of soldiers (4), is from its nature no sufficient ground of excuse. However, there may

(1) Boehmer, *ad Const. Crim. Carol. Art.* 179, § 6; Carpzovii, *Prax. Crim. Quæst.* 145, *ibique*; Boehmer, *in Observ. v. Hall and Hamelsveld, Harmen Alfkens. Amst.* 1798.

(2) Boehmer, *ad Const. Crim. Carol. Art.* 137, § 23.

(3) Carpzovii, *Prax. Crim. Quæst.* 147.

(4) C. Feltman, *over den Articul-brief, Art.* 67.

be cases in which the judge ought to take this circumstance into consideration, and a distinction is properly drawn between the cases where he has become drunk voluntarily and where he has become drunk against his will. If he has become drunk through the seduction of others, this may sometimes afford reasons for passing an exceptional punishment. But if the person who commits the offence has voluntarily drunk himself drunk in order to be able to commit the crime with the more courage and firmness, then drunkenness, no matter how bad it is, can in no way serve as an excuse; on the contrary, the crime in that case is still more serious and punishable than if it were committed when sober (1). If the drunkenness, though voluntarily brought about, has caused total insensibility, and there is no sign of a premeditated purpose to commit an offence, but, on the contrary, the person who committed the offence shows a sincere repentance, there may sometimes be reasons for mitigating the punishment. But in this case all depends on the circumstances, which ought all to concur in favour of the person committing the offence; for in general the judge should not be ready to admit drunkenness as a good ground of defence (2).

X. The defence on the ground of anger and rage is <sup>Anger.</sup> really of no account; but if there are any mitigating circumstances in favour of the person committing the act: e.g., if it appears that the criminal had legal grounds for anger, or that he did not commence the quarrel; if he shows, immediately after the completion of the act, repentance and regret; if there are no signs

(1) Leyser, *Med. ad Pand.* Tom. 1, *Spec.* 59, *th.* 3, & Tom. 5, *Spec.* 348.

(2) Carpzovii, *Prax. Crim. Quæst.* 146; Quistorp, § 42-44.

of a wicked intention to commit an offence; if he is still young, etc., such circumstances may be taken into consideration in mitigation of punishment (1).

Ignorance of  
law.

XI. If the person committing the offence pleads *ignorance of the penal law*, a distinction must be drawn, viz., whether the atrociousness of the crime must have been apparent to every person, even to the most ignorant and uneducated, in which case the pretended ignorance is of no account (2). But if there is reason to suppose that, owing to the very rare occurrence of such crimes, or for other reasons, the rigour of the law was unknown to the person committing the offence, the judge may not indeed, on account of this want of knowledge and experience, entirely remit the punishment, but may mitigate it (3). This excuse is the more readily admitted if the law is one peculiar to the country, or a local law, and the person committing the offence a stranger. But if he is an inhabitant of the country, if the law has been properly proclaimed, if it is sufficiently generally known, if it does not appear to have fallen into disuse, then the pretence of ignorance is of no avail (4). Of just as little account in general is the pretence that, although one knew the law, one did not know that it was applicable to the act committed. At any rate, this mistake must be unavoidable, and must appear very clearly from the concomitant circumstances before any notice can be taken of it (5).

(1) Carpzovii, *Prax. Crim. Quæst.* 6, *Quæst.* 18, n. 5, *seqq. Quæst.* 147, n. 61, *seqq. ibique*; Boehmer, *in Observ.*

(2) *L.* 2, *C. de in jus. voc.* *L.* 11, § 10, *ff. ad Leg. Jul. de adult. L.* 37, *ff. de minor. L.* 7, *C. unde vi.*

(3) Boehmer, *ad Const. Crim. Carol. Art.* 179, § 12.

(4) Quistorp, § 48.

(5) *Ibid.* § 49.



## SECTION VI.

XII. Children who have not yet attained the age of Infancy. *seven* are not liable for any acts which are contrary to law, because they cannot be presumed to have the proper use of their understanding or will, any more than intention or negligence can be presumed in their case (1). They cannot therefore be punished for crimes (2); but in order to check their wickedness they are only chastised by their parents, guardians, or teachers (3). If the children are above seven years of age, but under the age of puberty: i.e., under *fourteen* years, they are left to the chastisement of their parents, etc., in cases of trifling offences (4); but if they commit a serious offence, and if there is reason to suppose that there is an intentional wickedness in them beyond their years, the usual public punishment is not indeed inflicted upon them, but they are punished by the constables by whipping, by imprisonment for a time, or by some other exceptional *correction* (5).\*

XIII. With respect to those persons who are more <sup>Minority.</sup> than fourteen years old, but *under the age of majority*, their minority may be taken into consideration as a reason for mitigation, especially in crimes arising out

(1) L. 23, § 2, ff. de ædil. edict.; L. 22, ff. ad Leg. Corn. de fals.; L. 12, ff. ad Leg. Corn. de sicar.

(2) L. 7, C. de poen.

(3) Boehmer, ad Const. Crim. Carol. Art. 179, § 2.

(4) Ibid. d. l. Art. 164, § 1.

(5) L. 37, ff. de minor.; L. 6, pr. ff. ad Leg. Jul. pecul.; L. 1, § 32, ff. ad Scit. Silan.

\* *Correctie*, a summary punishment, generally a fine (*Kersterman*, 23).—TR.



of incontinence and of no great importance (1) ; but where the crime is serious, if it is repeated more than once, if the person committing the offence is not much under age, if there is every reason to suppose in him a wicked intention, then minority is of little avail (2). If, on the contrary, there are no sufficient signs of intention and wicked deliberation, if he evinces a sincere sorrow and repentance, if the act is the result rather of excessive passion than of an intentional wickedness, if there is good reason to hope for an amendment in his life for the future, then minority is of very great importance in the determination of the punishment even in cases of crimes otherwise punishable with death or corporal punishment (3).

Involuntary  
acts.

XIV. As all crimes must consist in a *free and voluntary* act, the offences which may be committed by persons in their sleep, or by so-called somnambulists, cannot properly be included under crimes (4).

## SECTION VII.

Conspiracy of  
criminals.

Those persons who abet in (the commission of) a crime, to such an extent that but for their co-operation it could not have been committed, are called *accomplices*. When the complicity is founded in a previous agreement and engagement to commit certain crimes in common, it is termed a *complot* or *conspiracy*.

(1) *L. 1, C. si adv. del.* ; *L. 37, § 1, ff. de minor.* ; *L. 108, ff. de Reg. Jur. L. 16, § 3, ff. de poen.*

(2) *L. 9, § 2, L. 37, § 1, de minor.* ; *L. 38, § 4, ff. ad Leg. Jul. de adult.*

(3) *L. 108, ff. de Reg. Jur. L. 16, § 3, ff. de poen* ; Cocceji, *Exerc. Curios. Tom. 2, Disp. 41.*

(4) Boehmer, *ad Const. Crim. Carol. Art. 179, § 7.*

If, therefore, the parties to this conspiracy have met together in conjunction for the commission of a certain act, and have been prepared with mutual aid and co-operation, or have been used as spies or as sentinels against danger, they are all equally punishable, though the act itself: e.g., a murder, has only been committed by one of them; unless the particular circumstances connected with the act should create an exception in the determination of the punishment: e.g., if a person has fallen into a conspiracy by force or simplicity (1). If crimes of different natures, which have no direct connection with each other, are committed at the same time by different sections of the same conspiracy, each act must be considered by itself, although the perpetrators are all parties to the same conspiracy (2).

### SECTION VIII.

If the participation in the crimes of others is not *Accomplices*, founded in a deliberate conspiracy, but merely consists in abetting them, a distinction must be drawn between such persons as have directly aided and assisted in the commission of the crime, and those who at the time thereof, or afterwards, commit punishable offences whereby the crime is consummated or concealed. The former are properly speaking *accomplices* (*socii criminis*), who are equally liable to capital or corporal punishment. The others are only abettors of the crime, and are generally subjected to an exceptional punishment (3). With respect to this abetting of the crime,

(1) Boehmer, *d. l. Art.* 148, § 1; Quistorp, § 54.

(2) Quistorp, *d. l. in not.*

(3) Boehmer, *d. l. Art.* 177, §§ 1, 2.

the degree of participation must be carefully considered. This degree is *perfect* or *less perfect*; and according to this also the degree of punishment is determined: e.g., if a person has furnished the instruments for the consummation of a crime of which he had knowledge, although he has not assisted to commit the crime itself, the participation is *perfect* (1). A person may also become a party to a crime after it has been committed: e.g., by harbouring or concealing the criminals, by sharing in the profits obtained by means of the crime, etc. (2).

Ordering the  
commission of  
a crime.

*Ordering* the commission of a crime is held to be a participation therein; and in determining the punishment thereof the circumstances should be taken into consideration: e.g., whether in giving the order the mode of commission was at the same time prescribed, whether the person charged was bound to obey and was in subjection to the person giving the order, etc. (3).

Counselling.

So also *counselling* the commission of a crime is held to be participation therein. In this case also the circumstances are taken into consideration: e.g., whether the counsel is general, or whether it defines the mode of commission; whether the person who commits the act had previously had the intention of committing the offence, and is now more encouraged to do it, and whether indeed the counsel first induced the crime (4).

(1) Quistorp, § 56.

(2) *L. 1, C. de his. qui latron*; Boehmer, *d. l. Art. 177*, § 9; Quistorp, §§ 57, 58.

(3) Boehmer, *d. l. Art. 177*, § 4; Putman, *Opuscul. Jur. Crimin.* No. 1.

(4) Quistorp, § 60.

*Not preventing* the crimes of others may also afford <sup>Not preventing the crime.</sup> a reason for (inflicting) an exceptional correction, particularly when a person had a suitable opportunity, or could by any way be considered under an obligation to do so (1).

In short, it is clear from what has been stated that the judge must give an attentive consideration, and one founded on the knowledge of human nature, to the case in all its bearings, and the concomitant circumstances, in order to guide him in determining the guilt of the offender.

The *concealment* of crimes, which are still to be <sup>Concealment of the crime.</sup> committed, is also to be considered as a species of participation, liable to an exceptional punishment. But if the crime has already been committed, then the concealment thereof is not punishable unless the welfare and security of the state depended upon its discovery, or if some special law or official position imposed this obligation (2).

## SECTION IX.

The gravity of offences is generally determined by <sup>Estimating the magnitude of crimes.</sup> the following rules: 1st, A crime is more serious in proportion as it is more inconsistent with our obligations to do or to refrain from something. Hence a crime which violates the public security of the state is more serious than that which violates the security of an individual (3). 2nd, A crime is more serious in proportion as it is committed with more deliberation and

(1) Quistorp, § 61.

(2) Boehmer, *de obligatione ad revelandum occulta*, in *Exercit. ad Pand. Tom. 6, Exerc. 97*.

(3) Grotius, *de J. B. ac P. Lib. 2 Cap. 20*, § 29



consciousness of committing a crime. Hence the repetition of a crime is graver than one committed for the first time. So also the crime of persons who repeat a crime after having already undergone a punishment for the same kind of offence, is graver (1). 3rd, A crime is more serious in proportion as it causes more injury and danger. Hence a crime actually committed is graver than one which has only been attempted. A crime is also more serious when it is coupled at the same time with other offences.

The gravity of the crime of accomplices is also determined by the same rules. Thus it is more serious to be an accomplice as the result of a previously-arranged conspiracy (complot) than to be an accomplice by accident in a single act. Actual assistance rendered, and co-operation in (the commission of) a crime is more serious than mere counselling. The liability for a crime is less great when a person has been seduced to it by his parents or others to whom he owes obedience (2).

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## CHAPTER II.

### ON PUNISHMENTS IN GENERAL.

#### SECTION I.

Punishments  
and their  
object.

By *punishment* is understood the suffering which is inflicted on a person, in the name of the Crown, on account of the non-fulfilment of those duties which are

(1) *L.* 28, § 3, *ff. de poen.*

(2) *L.* 157, *pr. ff. de Reg. Jur.*; Leyser, *Medit. ad Pand. Tom.* 9, *Spec.* 580, *Th.* 8.

imposed upon him by the laws of the state. The principal object of a punishment consists in this: that an impression is thereby made upon others, and they are restrained from further disturbing the peace and security of the state by acts of the same kind (1). In punishments which are not capital, the object (of the punishment) should also tend to the improvement of the criminal (2). The object should also, if possible, be to afford satisfaction to the person injured.

## SECTION II.

Punishments are divided into *severe* and *light*. The Various kinds of punishments, severe affect life or limb, and are again either simple or aggravated by additional penalties. They are also divided into *ordinary* (punishments), which are inflicted in the same way upon all transgressors of the law; and into *exceptional* (punishments), which are determined according to the greater or less responsibility for the crime.

With respect to the different kinds of capital and corporal punishments, the farther we go back to the ages of darkness and prejudice the more we find that men took a delight, as it were, in punishments of the most exquisite cruelty (3); but the more we approach the days of enlightenment and common sense, the more we find that these barbarities are disapproved of, and that the judge acts most in accordance with his

(1) *L. 1, C. ad Leg. Jul. repetund.*

(2) *L. 20, ff. L. 14, C. de poenis.*

(3) Heineccii, *Elem. Jur. Germ. Lib. 2, Tit. 30*; Putman, *Elem. Jur. Crim. Lib. 1, Cap. 2, § 66, seqq.*

dignity when he is strict, indeed, but never cruel (1). The *capital* punishments which have still remained in use are: *a*, breaking on the wheel, with or without decapitation; *b*, the gallows (hanging); *c*, the sword; *d*, strangling, with or without scorching. Quartering, burning, drowning, etc., have fallen into disuse. The practice of exhibiting corpses on a wheel or on the gallows outside the town, until they are utterly destroyed by the atmosphere or birds, has been abolished for some years (2). The *corporal punishments*\* still in use are: *a*, flogging, with or without the halter round the neck, and with or without branding; *b*, confinement in a penitentiary; *c*, the sentence of hard labour; *d*, the waving of the sword over the head; *e*, exposure on the pillory, with or without rods; *f*, praying, on bare knees, for the forgiveness of God and the court; *g*, spare diet (bread and water) for some days. The punishments which consist in the cutting off of limbs have long since been abolished as barbarous; there are only some instances still of the punishment of piercing the tongue with a spike, cutting across the face, and a few more.

To the above-mentioned punishments may also be added those which, although not inflicted directly upon

(1) Seneca, *de Ira*, *Lib.* 1, *Cap.* 5, 14, 15, & 16,—*L.* 11, *pr. ff. de poenis*.

(2) *Pub. Holl.* 6 March, 1795. Is the unlimited abolition of this practice in all respects a thing to be approved of? Is it so improper in cases of atrocious crimes to keep alive the recollection of an exemplary punishment, to the terror of evildoers, by this exhibition? We have often been of this opinion, and we saw with interest that the compilers of the *Ontwerp van een Lijfstraffelijk Wetboek*, p. 15, have considered these opinions well founded.

\* I.e., Bodily punishment, as distinguished from a fine.

the body of the criminal, are yet in many cases of crime, and for good reasons, made use of. To this class belong: *a*, banishment, for life or for a certain number of years, from the whole country, from a certain district, or from a particular place (1); *b*, being declared dishonourable and infamous; *c*, forfeiture of an office or situation.

Lastly, it is often no unsuitable way of checking crime to punish the criminal through his property, by imposing heavy or smaller fines, for which corporal punishment is often substituted, if the person sentenced does not pay the fine within a certain time (2).

### SECTION III.

Although it is the duty of mankind and Christians to exclude all that is cruel and barbarous from their criminal tribunals, yet it would be an absurdity always to punish crimes with one and the same sort of capital or corporal punishment (3). There are distinct degrees of aggravation and mitigation in offences, which must be taken into consideration in determining the nature of the punishment. Surely it would be absurd to punish the murderer and the person guilty of homicide, the burglar and the thief, with the same kind of punishment.

(1) On the important question whether and in what cases the judges of our country can banish a person beyond their jurisdiction, comp. Bynkershoek, *Quæst. Jur. Publ. Lib. 2, Cap. 17*; V. d. Wall, *Handv. van Dordrecht*, 2 D. pp. 700 & 701.

(2) *L. 1, § 3, ff. de poen, L. 4, C. de serv. fug. Gen. Ordon. 28, Aug. 1749, A. 4, Pub. 2 Mar. 1751, and 23 Jan. 1753.*

(3) This remark is of some weight in opposing the introduction of the punishment of the guillotine. Hence already the distinction of making some great criminals put on a red shirt and others not.



Confiscation.

In former times capital punishment was sought to be made more severe by adding a *confiscation* or forfeiture of goods; but since the year 1732 that has been abolished in this country (1); and justly so, inasmuch as all punishments by which the surviving children and relatives of criminals suffer with them should be abolished.

#### SECTION IV.

Rules for determining punishments.

The general rule is that *there can be no punishment where there is no crime*. Therefore, in determining the punishments, the judge should in the first place bear in mind all that has been stated in the former chapter about the nature and degrees of crimes. In order that the punishment affixed by law may be perfectly applicable, the crime must have been wilfully consummated by some person, upon whom the punishment can be inflicted.\* If the crime has not been consummated, but only partially executed, the ordinary punishment of the law is not applicable (2).

Another rule is that *the punishment for the crime can only be inflicted upon the person who has committed the crime and his accomplices* (3). Thus parents are not punishable on account of their children, or masters on account of their servants, etc., unless proved to be accomplices (4). Heirs cannot be punished for the crimes of those to whose inheritance they have

(1) *Resol. Holl.* 1 May, 1732. See further *Gr. Pl. Boek*, VI. D. p. 577, VII. D. p. 844, & IX. D. pp. 458, 459, 460, 462.

\* The text says "*in wein dezelve vallen kan.*" This must be a misprint; I have read it "*op wein,*" etc.—TR.

(2) Quistorp, § 83.

(3) *L. 22, C. de poenis.*

(4) *Regts. Observ. over De Groot's Int.* 1 D. Obs. 75.

succeeded (1). They are liable, however, for fines already imposed or respecting which proceedings were already pending, if the person condemned should die before payment (2).

If a person has committed *several crimes*, a distinction must be drawn between the cases, where they are of a different nature and where they are of the same nature. In the first case, all the special punishments which are affixed to the different crimes should in strictness be imposed, so far as their execution will permit of their being cumulative (3); but it is usually the custom in this case also to inflict a more severe kind of corporal punishment, which may be deemed an equivalent for all the other special punishments added together (4).

If a person commits a crime punishable with corporal punishment, and afterwards commits a capital offence, it is clear that the capital punishment extinguishes the corporal punishment, though a more severe capital punishment may then be inflicted. If a person by the commission of several crimes has become liable to different corporal punishments which cannot be simultaneously carried out, the heaviest corporal punishment must be inflicted; but in no case can capital punishment be substituted for all those corporal punishments added together. If the various crimes are all of the same nature, we must consider whether the law affixes a special punishment to the repetition of the crimes; and, if so, we must follow it: but if not

(1) *L. 26, ff. de poen.*

(2) *L. ult. si reus vel accus. mort. fuer.*

(3) Boehmer *ad Carpzovii, Prax. Crim. Quæst. 132, Obs. 1.*

(4) *L. 17, C. de poenis.*

we must confine ourselves to the ordinary punishment, which, however, should there be accompanying and aggravating circumstances, may be made somewhat more severe (1).

If the same crime has been committed by *several persons*, then, as far as damages are concerned, they constitute, in the language of our old laws, *one guilty person* (2), but in determining the punishments (if the fact that they have taken part in the same *complot* makes no difference) each must suffer for his own acts (3).

In cases of very serious crimes, in which it is necessary for the maintenance of the public safety to create a general impression and warning, it used also once to be the custom to execute the punishments upon the effigies of the criminals (4); but this is now very seldom done. Somewhat of the same kind is the practice of fixing the names of deserters to the gallows, as a greater deterrent.

The execution of punishments upon the *corpses* (5) of criminals is one of the barbarities of former ages. No further use is now made of this practice than to bury such corpses in those despised places where criminals are generally interred (6).

(1) Quistorp, §§ 88-90.

(2) De Groot, *Int.* 3 B. 34 D. § 6; *Regt. Obs.* 2 D. Obs. 89.

(3) *L.* 22, *C. de poen. L. ult. ff. ad Leg. Corn. de sicar.*; Boehmer *ad Carpzovii Prax. Crim. Part 1, Quæst.* 25, *Obs.* 1, *Tom.* 1, p. 158.

(4) Putman, *Advers. Jur. L.* 1, *C.* 14, *L.* 2, *C.* 25.

(5) Feltman, *Articul-brief*, p. 255.

(6) Boehmer *ad Carpzovii Prax. Crim. Part 3, Quæst.* 131, *Obs.* 3.

## SECTION V.

In the punishment of crimes regard must be had to the laws of the place where the crime was committed; although the criminal has been apprehended elsewhere, and the proceedings against him have been instituted there (1). If the law does not determine the punishment for a crime which has been commenced but has not been entirely consummated, a difference should be made in the punishment, according to the extent to which the attempts of the criminal have been carried out; and according to this extent, and the obvious intention of the person committing the act, an exceptional punishment should be inflicted (2).

According to what laws punishments are to be determined.

## SECTION VI.

No judge has the power to alter, increase, or mitigate punishments which are clearly prescribed by law, and which do not permit of any doubt of their being applicable to the crime, if the law does not permit him to do so, or if there are no special circumstances which afford a lawful ground for such an alteration, increase, or mitigation (3). Such lawful grounds are afforded in the following cases: when the manifest object of the punishment imposed by law would not be attained by its infliction; when it is impossible, or at least very difficult, to execute the prescribed punishment upon the person of the criminal; when the reason for the law is obscure and doubtful; when the execution of the punishment

Discretionary punishments.

(1) Voet, *ad tit. ff. de poen. n. 11.*

(2) Quistorp, §§ 96; 97.

(3) *L. 11, pr. ff. de poenis, L. 15, C. eod.*



would be highly prejudicial to other innocent persons; when the state or condition of the person makes it necessary that an exception to the law should be made (1).

If the determination of the punishment is left to the discretion of the judge, and if the crime cannot be classed among the serious ones, he is then at liberty to alter the punishment according to the circumstances of the person and of the case, and, instead of inflicting imprisonment, an infamous, or even corporal punishment, may impose a fine or the like. This discretionary determination of punishments exists when the law on this point is not sufficiently conclusive, or where, on account of the nature of certain evidence, it is questionable whether the punishment affixed by law is quite applicable. The discretion of the judge is, however, not a matter of caprice, but has its limits, within which it must remain confined (2). Therefore the judge must observe, among other things, how crimes of a like nature are usually punished by the laws and customs of other tribunals. These discretionary punishments are limited at the utmost to corporal punishment, and can never be made to include capital punishment, even although the frequent commission of the crime, the welfare of the State, or some other weighty reasons, might appear to render such a punishment necessary; because in all such cases an application setting forth these reasons should be made to the legislature, whose sanction is necessary before the judge has power to inflict such punishment (3).

(1) Quistorp, § 99.

(2) *L. 78, L. 79, L. 80, ff. pro focio.*

(3) Quistorp, §§ 100 & 101.

## SECTION VII.

Meanwhile the question, What are the reasons which may weigh with a judge in mitigation of punishment? merits a particular inquiry. In general it may be said that they are deduced from the greater or less degree of *morality* of the acts, and their consequences (1). Mitigation of punishment is often secured to the criminal by declaring his case to be a *civil* and *compoundable*\* one, or by receiving him in *submissie*\*—expedients of which it will be more convenient to treat hereafter. *Compensation* does not exist in criminal cases except in the case of “*injuria*” and smaller offences (2). *Repentance* shown for a crime contemplated, but not quite consummated, or when shown immediately after the consummation of the crime, may serve to prove that the degree of wilfulness was small; and, above all, if it is accompanied by other favourable circumstances: e.g., immediate compensation for the injury caused, they may afford a reason for mitigation of punishment. However, it must be carefully considered in this case whether this repentance does not fall under the description of the so-called “*gallows-repentance*,” which arises more from the fear of punishment than from the love of virtue, and which, especially in serious crimes already consummated, is of no avail (3).

Reasons for mitigation of punishment.

The *age* of the criminal (if he does not stand

(1) C. J. Heils, *Judex et defensor in Processu inquisit.* Cap. 6, pp. 335–546.

\* Vide infra, ch. ix. § 4.

(2) L. 36, ff. *de dol. mal.* L. 39, ff. *sol. matr.*

(3) Leyser, *Medit. ad ff. T. 10, Spec.* 645, th. 7 & 8.

on the same footing as insane people, on account of his dotage) is in itself no reason for mitigation of sentence, inasmuch as old people ought to be able to judge of the morality of their acts more strictly than young people. Nevertheless, the advanced years of the criminal, and the infirmities attendant thereon, should very much be taken into consideration in determining the nature of the punishments, especially in the case of corporal punishments; and the punishment is therefore frequently limited to confinement in a penitentiary (1). The *weakness* of the female sex now and then affords a reason for punishing women less severely than men, unless the crime consists in a violation of the public security, or acts of personal violence, to which a higher degree of morality is attached, even by women themselves (2). If a woman is *pregnant* no capital punishment can be executed upon her until after her confinement; nor any corporal punishment, for which in such a case some other kind of punishment, as far as possible, is substituted (3). A *bad education*, and the consequently less perfect perception of evil may—when the crime is not an atrocious one, and there are no concurrent aggravating circumstances, and there is hope of better conduct in future—also sometimes afford ground for mitigation of punishment (4). *Previous good conduct*, and the fact that the person has *been led away* by others, provided it is satisfactorily proved, and there appears to be only a slight degree of wilfulness, may be taken into

(1) Boehmer *ad* Carpzovii *Prax. Crim. Part 3, Quæst. 144, Obs. 1.*

(2) Quistorp, § 108.

(3) *L. 3, ff. de poenis, L. 18, ff. de stat. hom.*

(4) Quistorp, § 109.



consideration by the judge in smaller offences; but if the person led away has already attained the age of manhood, if he continued to give ear to these evil counsels, and proceeded in the commission of the crimes, then he cannot avail himself of this seduction in extenuation of his criminal acts (1). If the criminal becomes *sick*, the execution of the punishment may on that account be stayed; but such sickness can make no difference in the punishment imposed by law; unless it be of such a nature that corporal punishment could not be executed upon the criminal without obvious danger (2). The question whether a *long imprisonment* operates in mitigation of punishment cannot be answered without drawing distinctions. If the imprisonment has been unusually long, without any fault of the offender, and if the crime is not a capital offence, it affords not only a ground for mitigation, but sometimes, in smaller offences, the imprisonment is even reckoned as the punishment of the accused, either wholly so or in part. But in capital crimes the length of the imprisonment of the criminal cannot exempt him from death (3).

Further, among the reasons for mitigation of punishment may be included: the *intercession* of the person injured; the fact that the accused is a person of great *talent and merit*; that *poverty* was the prime cause of the crime; that the accused has a *very numerous family of children*; that the accused made a *voluntary*

(1) Quistorp, § 110.

(2) Ibid. § 111.

(3) *L.* 25, ff. *L.* 23, *C. de poenis*; Leyser, *Medit. ad Pand. Tom.* 10, *Spec.* 645, *th.* 12; Boehmer *ad Carpzovii Prax. Crim. Part* 3, *Quæst.* 149, *Obs.* 2.



*confession* of his crime, not that the crime, although yet barred by prescription, was, however, committed a *long time ago*; that the first cause for the crime was given by the person injured or wronged; and others of a like nature. But it stands to reason that in order to determine whether these reasons should be allowed as lawful and well-founded, attention should be paid to the nature and quality of the crime, and all the exceptional concurrent circumstances, when the weight or futility of such grounds of excuse can very easily be determined by a judicious judge (1).

## SECTION VIII.

Classification  
of particular  
crimes.

Having now treated of crimes and their punishments in general, we will now proceed to the consideration of the particular kinds of crimes. For the sake of proper order they may be classed under the following principal heads:—

- I. Crimes affecting religion.
- II. Crimes against the state and the public security.
- III. Crimes against the life, person, or reputation of our fellow-men.
- IV. Crimes against the property of our fellow-men.
- V. Crimes arising from incontinence.

(1) Quistorp, §§ 113-117, *b*.

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## CHAPTER III.

### ON CRIMES AFFECTING RELIGION.

#### SECTION I.

THE more one goes back to the ages of ignorance, superstition, excessive sectarian zeal and intolerance, the larger and more extensive is this class of crimes (1); but the further enlightenment and moderation has penetrated, the smaller the list of these crimes has become. Those unhappy days, when *heretics* were persecuted by a barbarous Inquisition, and so-called *sorcerers* were persecuted even unto death, are past; and all these kinds of cases are now withdrawn from judicial cognisance, in so far as they do not directly cause a disturbance of the public peace, in which case they can certainly still afford ground for a discretionary correction (2). We will therefore rather confine ourselves to two kinds, *blasphemy* and *perjury*.

On these crimes in general.

#### SECTION II.

I. *Blasphemy*.—By this is understood all such words or acts whereby the Supreme Being is reviled, contemned, or cursed (3). Under this head may be classed: a wilful circulation of a disbelief in the existence of an all-governing Supreme Being; contemptuously ascribing to God such acts as are inconsistent with His attributes; uttering curses and public

Blasphemy.

(1) Damhouder, *Prax. Rer. Crim.* C. 61.

(2) Montesquieu, *L'Esprit des Loix*, L. 11, C. 4.

(3) Meister, *Princ. Jur. Crim.* § 433.

contempt against God; ridiculing and, above all, disturbing public divine worship, etc.

It is therefore obvious that in this crime the degree of intention of bringing God into contempt is material, and that the reasons for mitigating the punishments for crimes are of very great use in this case (1).

The punishment for this crime formerly extended even to capital punishment, or some exemplary corporal punishment: e.g., the piercing of the tongue with a spike (2). According to the modern and more moderate way of thinking, and because this crime is punishable principally on account of its influence upon the disturbance of the public peace, capital punishment is hardly ever applicable; much greater favour is shown for the rule *that the punishment for blasphemy is discretionary*; regard is chiefly had in these cases to corporal punishment, imprisonment, and fines (3).

### SECTION III.

Perjury.

*Perjury.*—This crime is committed either when a person intentionally violates obligations which he had bound himself by an oath to fulfil, or when a person wilfully, and to the prejudice of a fellow-creature, declares, under oath, that to be *true* which he knew to be *false*.

The latter kind of perjury is certainly a more serious crime than the former; and, generally, perjury is greater or less according to the greater or less degree of the malice or cupidity of the object, and also

(1) Quistorp, §§ 126, 127.

(2) Boehmer, *ad Const. Crim. Carol. Art.* 106.

(3) Voet, *ad tit. ff. ad Leg. Jul. Majest. n.* 1.

according to the greater or less injurious consequences (1).

By our oldest laws perjury was punished by branding the face with a red-hot iron (2); also by cutting off the joints of the forefingers (3); but those punishments by which the body is mutilated are now nearly quite obsolete, and the punishments of flogging, imprisonment, banishment, etc., have taken their places (4). Swearing a false oath is justly considered to be an atrocious crime; the intention is so obvious, and the injuries to society are incalculable, so that a judge acts according to his duty if he deals seriously with this offence, and, above all, punishes it with no light hand.

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## CHAPTER IV.

### ON CRIMES AGAINST THE STATE AND THE PUBLIC SECURITY.

#### SECTION I.

IN this class of crimes may be placed: *high treason*, *crime of læsæ majestatis*, *falsifying coin*, *public violence*, *arson*, *extortion and exaction*, *bribery with respect to public offices*. Different species of these crimes.

(1) Boehmer, *ad Const. Crim. Carol. Art.* 107.

(2) *Keuren van Zeeland, C. 4, Art.* 11.

(3) J. v. d. Eyck, *Handv. van Zuidholl. p.* 199.

(4) Voet, *ad tit. ff. de jurejur. n.* 32.—*Sententie van den Hoogen Raad, in de zaake van den Procureur Generaal, contra Marijtje Blanken, van 15 Oct., 1756.*



## SECTION II.

High treason.

I. *High treason*, or the *crimen perduellionis*. This crime is committed by those who, *with a hostile intention* (1), disturb, injure, or endanger the independence or security of the state: e.g., by bringing the state in subjection to a foreign power; by traitorously surrendering fortresses, towns, or other possessions of the state; disclosing state secrets with a hostile intention; assisting the enemy in time of war, to the prejudice of the state; rendering the frontiers of the state obscure with a hostile intention, etc. (2). High treason may be committed by all the inhabitants of a state, or by persons who sojourn there for a time (3). Every person who becomes aware of high treason is bound to disclose it, or he is deemed guilty of a crime, and punishable (4).

The punishment for this crime is generally death, and the manner and mode of execution is determined according to the greater or less degree of aggravating circumstances (5).

## SECTION III.

*Crimen læsæ  
majestatis.*

II. *Crimen læsæ majestatis*. This crime so far resembles that of high treason that it is likewise committed by such acts as violate or endanger the security of the state; but differs from it in this

(1) Boehmer, *ad Const. Crim. Carol. Art.* 124, § 5.

(2) *Ontwerp van het Lijfstraff. Wetboek.* 2 Hoofdst. 1 Afdeel, Art. 2-20.

(3) Voet, *ad tit. ff. ad Leg. Jul. Majest. n.* 4.

(4) *Ibid. ad d. t. n.* 11; Boehmer *ad Carpzovii Prax. Crim. Part. 1, Quæst.* 41, Obs. 9.

(5) *Ibid. ad d. t. n.* 6.

respect, that it does not require that *hostile intention* without which high treason cannot exist (1).

It stands to reason that death can seldom be the punishment for this crime; but that the punishment varies very much, according to the greater or less degree of criminal intention, the greater or less degree of injury resulting, and the different situations\* of the persons who commit the crime: e.g., waving the sword over the head, imprisonment, banishment, etc. (2).

#### SECTION IV.

III. *Falsifying coin.* This crime is committed in <sup>Falsifying coin.</sup> different ways: *a*, by coining money of the realm not of the requisite intrinsic value; *b*, by diminishing the value of coin of the realm; e.g., by clipping, filing, washing or dissolving with *aqua fortis*, etc.; *c*, by coining money of the realm of one's own authority, although it has the intrinsic value; *d*, by melting, breaking, or exporting contrary to law, the coin of the realm of one's own authority (3).

A more severe or lighter punishment may be inflicted, according to the nature of the different species of this crime and their various effects in injuring the state. Nevertheless, coiners who have committed the crime in the fullest meaning of the term are punished by our law with death (4).

(1) Boehmer, *Elem. Jur. Crim. C.* 5, § 72.

\* Post or office.—TR.

(2) Quistorp, § 158.

(3) *Ontwerp van het Lijfstraffelijk Wetboek*, Ch. 4.

(4) *L. 2, C. de fals. monet*; Voet, *ad tit. ff. ad Leg. Corn. de fals. n.* 8.—Whoever considers a little the incalculable injury which is inflicted upon the state by this crime cannot deem capital punishment

Persons who have only been guilty of clipping, or of the lesser kinds of the crime of falsifying coin, are punished with corporal or some other punishment, according to the circumstances (1).

Imitating or falsifying state papers: e.g., bonds, redeemable annuities, scrip, coupons, and the like, is not unjustly punishable with death, like falsifying coin, on account of the injurious consequences to the state and its inhabitants; and if there are any concurrent mitigating circumstances it is punishable with corporal punishment, or some exceptional punishment (2).

#### SECTION V.

Insurrection.

IV. *Public violence.* First and foremost in this class must be placed the crime of *insurrection*, i.e., the application of violent and forcible means by which the public peace and order are endangered or the authority of the established authorities and public officers is assailed (3). As this crime may be committed by divers acts and in different ways, so also the punishments are various. Under very grave circumstances even capital punishment may be taken into consideration, but usually this crime is punished with corporal punishment, imprisonment, or banishment (4).

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too severe; and whoever considers it specially in relation to a commercial country must be confirmed in that opinion. It may be imagined how our interest was excited when the framers of the "Lijfstraffelijke Wetboek" came to the conclusion that corporal punishment alone was applicable.

(1) Voet, *ad d. t. n. 8.*

(2) *Ontwerp van het Lijfstraff. Wetboek, Ch. 5.*

(3) Boehmer, *ad Const. Crim. Carol. Art. 127, § 1.*

(4) *Ibid. d. l. § 3; Quistorp, § 183.*

In troubled times, when this crime is rather prevalent, the government usually provides against it, and determines the punishments by special laws; of which there have been repeated instances in our lifetime (1). As, however, the origin of this crime is often founded in the different opinions respecting the measures of the government, especially when the latter has been affected by revolutions having taken place, there is hardly any crime in which greater caution is to be enjoined upon the judge, so as on the one hand to preserve the maintenance of peace and good order, and on the other hand not to render any one the unfortunate victim of political dissensions by excessive severity.

## SECTION VI.

The crime of *geweld* (*violence*) is committed not only by causing an insurrection, but by all such acts as have for their object the unlawful disturbance of the peace and security or a forcible invasion of the rights of other people (2). In this more extended sense it is usual to divide the crime of *geweld* into *public* and *private* offences, and to estimate them according to the person against whom, the place in which, and the means with or by which they have been committed (3).

It is in the nature of this crime that it cannot be subjected to the same punishment, and one which is always applicable, but the punishment must be dis-

(1) A number of *Publicatiën* of this sort may be found in the *Gr. Pl. Boek*, IX. Vol., 4 tit. Add to these the *Publ. of Mar.* 4, 1795, Mar. 1, 1797, Nov. 1, 1878, and others.

(2) Matthæus, *de Crimin.* L. 48, Tit. 4, C. 1, n. 3.

(3) Pothier, in *Pand. Justin. ad tit. ff. ad Leg. Jul. de vi publ. & priv.*



cretionary, varying according to the gravity of the crime and the manner in which it was committed (1), and hence there may be some cases in which capital punishment is applicable: e.g., by robbing the attendants of the mails (2); and, on the other hand, there may be other cases which are subject to slight punishments or merely to fines.

Prison breach. In this class of crime may also be included the rescue of prisoners from prison. The gravest case of this crime is when it is wilfully committed by the gaoler or keeper of the prison himself, and in case of a prisoner of much importance: in which case even capital punishment may be applicable (3). But if the crime is occasioned by want of attention and negligence, the punishment is discretionary, and proportioned to the circumstances of the case (4). If the rescue of a prisoner has been effected by third persons, enquiry must be made if it was accompanied with insurrection (*oproer*); or if any and what kind of act of violence (*geweld*) was committed at the same time, and according to these aggravating or mitigating circumstances the punishment is more or less severe (5). If the prisoner has himself effected his escape from prison by his own means, a distinction is justly made between cases where the imprisonment was a means of safe custody rather than where it was a punishment. In the former case, the attempted escape may be punished with a fine, according to the

(1) Groenewegen, *de Legib. abrog. ad* § 8, *Inst. de publ. jud.*

(2) *Plac. Gener.* 6 Dec. 1646, *in 't Gr. Pl. Bk.* 1, p. 527.

(3) Boehmer, *ad Const. Crim. Carol. Art.* 180, § 1; Voet, *ad tit. ff. de cust. & exhib. reor. n.* 8.

(4) Leyser, *Medit. ad Pand. Tom.* 8, *Spec.* 564, *th.* 8, *et seqq.*

(5) Boehmer, *ad d. Art.* 180, § 4; Quistorp, § 193.

circumstances of the case, besides the punishment for the crime itself. In the latter case the escape is separately punished, usually by an extension of the term of imprisonment, whipping with rods, and the like, unless the magnitude of the accompanying acts of violence necessitate a more severe treatment (1).

## SECTION VII.

V. *Arson*. This crime is committed when a person, <sup>Arson.</sup> with the wilful intention of injuring others, has set fire to buildings or other immovable property, whereby such property has caught fire and damage has been occasioned (2). In judging of the gravity of this crime (3) regard must be had : *a*, to the magnitude of the danger : e.g., if a whole town or community was thereby placed in danger of being burnt down the crime is more serious than if fire had been laid to an out-of-the-way and detached building ; *b*, to the intention of the incendiary, although the result has not answered to it ; *c*, to aggravating circumstances : e.g., if the arson is committed with intent to rob and murder, which in our old laws is termed *moordbrand* (4), the offence is more serious than if it sprang simply from a feeling of revenge, and an intention of inflicting an injury. The punishment for wilful arson is in our country death, chiefly by strangling and scorching the incendiaries, and, under circumstances of great aggravation, by burning them alive (5).

(1) Voet, *ad d. tit. ff. n. 9* ; Quistorp, § 194.

(2) Quistorp, § 196.

(3) Boehmer, *ad Const. Crim. Carol. Art. 125*.

(4) V. d. Wall, *Handv. van Dordrecht*, 1 St. p. 202, *Handv. van Vlaardingen*, p. 36.

(5) Voet, *ad tit. ff. de incend. ruin. naufr. n. 5*.

If a person has occasioned a fire through negligence, it is not deemed to be arson, but it is punished by a discretionary punishment in proportion to the degree of negligence, in addition to the liability of paying damages (1).

## SECTION VIII.

Oppression  
and extortion.

VI. *Extortion and oppression*, i.e., when a person with a view to benefiting himself, by abusing his office or authority, or by pretence of an order from the government, frequently by threats, compels and forces another to submit to that which he desires (2). Such extortioners are real pests to society, and therefore deserve to be checked by severe punishment. The punishments are discretionary, and, in addition to the restoration of that which has been extorted, they consist chiefly in the loss of office, imprisonment, fines and the like (3). Provision has been made by various laws against extortion by the military (4).

## SECTION IX.

Bribery with  
respect to  
public offices.

VII. *Bribery with respect to public offices*, i.e., when a person endeavours to obtain an honour or an office by unlawful and forbidden means. Most of our public officers, before entering upon their office, must take the *oath of purgation* (5); particularly also to this effect—that they will not allow themselves to be bribed by any gifts or donations in the execution of their office. If they violate this oath they are perjurers.

(1) Quistorp, §§ 203 & 204.

(2) Putman, *Elem. Jur. Crim.* § 194.

(3) Meister, *Princ. Jur. Crim. Sect. 2, Part 2, C. 19*, §§ 222–225.

(4) Voet, *ad tit. ff. de concuss. n. ult. in fin.*

(5) Ibid. *ad tit. ff. de Leg. Jul. ambit.*

## CHAPTER V.

### ON CRIMES AGAINST THE LIFE, THE PERSON, AND THE REPUTATION OF OUR FELLOW-MEN.

#### SECTION I.

THE crime against life consists in *homicide*: i.e., an act <sup>Homicide.</sup> by which a person in an unlawful and violent manner deprives a fellow-creature of his life. With respect to this crime there are several points which must be more closely examined, and we shall answer them as so many questions.

#### SECTION II.

*Upon whom can homicide be committed?* Upon all <sup>Upon whom it can be committed.</sup> living persons, irrespective of age or sex (1): also upon persons who are dangerously ill (2). Homicide cannot be committed upon monstrosities or misshapen offspring: it is even customary to smother them, but not without the knowledge of the government (3). But homicide can certainly be committed upon lunatics, miscreants, heretics, etc. (4). It is enough if a person takes away the life of a fellow-creature, whatever his position in the civil community.

(1) *L. 1, § 2, ff. ad Leg. Corn. de sicar.*; Leyser, *Medit. ad Pand. T. 9, Spec. 597, th. 5.*

(2) Boehmer, *ad Const. Crim. Carol. Art. 137, § 2.*

(3) De Groot, *Inst. 1 B. 3 D. § 5, Regts. Obs. 1 D. Obs. 7.*

(4) Boehmer, *d. l.*



## SECTION III.

By whom.

*By whom can homicide be committed?* By every one who has been the moral cause of the violent death of another, although he may not have killed him in the literal sense of the term (1). Thus homicide is also committed if a person causes the death of another by withholding the indispensable necessities of life, which he was bound to provide. And as a rule a person is guilty of homicide when an act is the immediate cause of death, and the latter is also the actual result of it.

## SECTION IV.

Mortal wounds.

*What can be laid down with regard to the infliction of mortal wounds?* In a case of violent homicide everything depends not so much upon the fact that the infliction of the wounds and injuries *led to and gave occasion* to the death, but upon the fact that it was the *sole and true cause* of the subsequent death (2). The deadliness of a wound is not to be judged of simply from the nature of the instrument used, for a blow with the fist may inflict a mortal injury (3), but it depends upon the position of the wound and the manner in which it was inflicted (4). If any person, or even one in the same condition as the deceased, who have died from the wound in the ordinary course of nature, then it is mortal *per se*, and the person who inflicted it is guilty of homicide. If the wound is only *mortal by accident*: i.e., is not *per se* so, on account of its

(1) Boehmer, *ad d. Art.* § 1.

(2) Quistorp, § 219.

(3) *L.* 7, § 1, *L.* 27, § 23, *ff. ad Leg. Aquil.*(4) On the difference of wounds mortal *per se* and by accident, compare the writers on medical jurisprudence: e.g., Ludwig, Hebenstreit, Plenck, Schlegel, and others.

nature, but owing to circumstances which arise after the injury had been inflicted, then one must enquire what was the cause of the accident: for example, much hæmorrhage, fever, convulsions, mortification, and similar accidents, which have not been occasioned by the wilfully wrong conduct of the wounded person, are no excuses for homicide: but such accidents, as he has brought them upon himself, by his wilfulness and negligence, and by which he has caused his death, provided the wound was not in its nature mortal *per se*, are excuses (1). The fact that the wounded person lived several days after (*nine* days, is the popular saying!) does not of itself make the wound one mortal by accident, but only tends, with other concurrent circumstances, to the probability that the wound indeed gave occasion to, but was not the cause of the death (2).

## SECTION V.

*How many kinds of homicide are there?* Homicide <sup>Wilful homicide.</sup> has its origin either in *intention, negligence, or accident*. The magnitude of the crime of homicide depends upon the greater or less degree of premeditation; upon the clear conception of the atrociousness of the crime and its consequences; upon the special relations between the person who commits the homicide and the deceased; upon the base object which he had expected to obtain from the homicide; and upon the reasons which might and ought to have withheld him from committing the act. Wilful homicide is either *aggravated*\* or *not*

(1) Quistorp, § 220.

(2) De Groot, *Int.* 3 B. 34 D. § 8, *Regts. Obs.* 1 D. *Obs.* 93.

\* Gequalificeerd (i.e., hoedanig gemaakt) seems to mean here *aggravated*. The use of the term *qualified* might convey the contrary meaning.—Tr.

*aggravated.* This aggravation is determined according to the place where and the time at which the crime is committed, according to the appearance of the deceased, the special relation between the deceased and the person who committed the homicide, the cruel manner in which the homicide was committed, and the cunning and malice with which it was planned. Such an aggravated homicide is generally called a *murder* (1).

The malicious intent of a homicide is held to be proved if a person has determined to commit homicide and accomplishes it in the manner determined upon: if a person by night, or in the dark, violently assaults another, and causes his death by repeated blows upon dangerous parts of his body; when the whole conduct of the person who commits homicide shows evident signs of his malicious intention to kill; when the person committing homicide has levelled his blows principally at the head or other dangerous parts of the body. In order to constitute homicide a *direct* intention is not always essential; an *indirect* object is also sufficient: e.g., if a person has assaulted another with the intention of wounding him, and the wounds have occasioned death, no matter how contrary to the direct intention of the person committing the assault (2).

## SECTION VI.

Homicide by  
negligence.

*Homicide by negligence* takes place when there is indeed no direct or indirect intention of causing death, but nevertheless an act is committed which might have been avoided had sufficient care been used (3): e.g., if

(1) Quistorp, § 221.

(2) Boehmer, *ad Const. Crim. Carcl. Art.* 137. §§ 4-7.

(3) Quistorp, § 224.



in the exercise of some employment a person acts so carelessly as to cause another to lose his life (1); if one keeps wild animals which are accustomed to bite, and in that way to kill people (2); if, in jest or chastisement, a person negligently exceeds the bounds of moderation, and thereby commits homicide; if a person kills another by negligently throwing or cutting something down; if a person, although unlawfully assaulted, exceeds, without reason, the limits of self-defence (3); if a person without having provoked an insult, has immoderately given way to his passion, owing to the insulting expressions and acts of the deceased; and in general, if a person could have foreseen that his act might be injurious to the health or life of another. Although the negligence which causes the violent death of another may be of very various degrees, and may thus be punished much more severely in one case than in another, yet homicide which has its origin in negligence is never to be judged of according to the rules of wilful homicide, and is therefore also never punishable with death (4).

## SECTION VII.

By *accidental homicide* is understood such acts as have their origin neither in the intention nor in the negligence of the person committing them, but which cause the death of another by a pure accident, contrary to all expectation. If all these circumstances concur, such an act is not the subject of any liability; but that very

Accidental  
homicide.

(1) *L. 31, ff. ad Leg. Aquil.*

(2) Boehmer, *ad Const. Crim. Carol. Art. 136.*

(3) *Ibid. ad d. l. Art. 142.*

(4) Quistorp, *d. § 224.*



rarely happens, and generally some signs of negligence are apparent (1).

## SECTION VIII.

Punishment  
for homicide.

*What is the punishment for homicide?* When it is wilfully committed, the punishment is death, according to divine and all human laws (2), the mode of execution being determined according to the aggravating or mitigating circumstances. Homicide by negligence, and without wilful intent, is punishable with a special punishment proportioned to the degree of negligence (3). If homicide is committed by several persons who have united together for that purpose and acted in common in its commission, they are all guilty of the death. If it is committed in the presence of several persons who all took part in the quarrel, then that person only who inflicted the mortal wound is punished with death; the others are punished with a discretionary punishment: the latter is also the case when it cannot be discovered which one of them inflicted the wound (4).

The reasons for mitigation of capital punishment may easily be determined from the general rules on this point, mentioned above (5). The following cases may be added: when experts differ as to the deadliness

(1) Boehmer, *ad Const. Crim. Carol. Art.* 146.

(2) *Deductie in Revisie, aan de zijde van den Hoofd-Officier der Stad Amsterdam, contra J. B. F. van Goch, Art.* 250-320. Does any person still exist who doubts the advisability of capital punishment for this crime? Magistrates of Rotterdam in the year 1798 expressed such doubts; but they were conclusively refuted in a *memorie* of the Court of Holland recorded in the resolutions of the Upper House of Parliament, on the 16th of August, 1798.

(3) Voet, *ad tit. ff. ad Leg. Corn. de sicar. n.* 9.

(4) Boehmer, *ad Const. Crim. Carol. Art.* 148.

(5) See *supra*, p. 195, *et seqq.*

of the wound; when the wounded person lived so long after, that the mortality of the wound may reasonably be doubted (1).

## SECTION IX.

*What is self-defence?* When a person commits Self-defence. homicide in defence of his body or life. The requisites of this defence are: *a*, a sudden and unlawful assault; *b*, a great and imminent danger of losing one's life by this assault; *c*, the impossibility of defending one's own life in any other way than by killing the person committing the assault (2). The defence of one's *honour* really affords no sufficient ground for homicide in self-defence, unless perhaps in the case of persons placed in such a position that their running away would ruin their worldly prospects (3). There is no doubt that a girl, if she has no other means, may defend her honour against a ravisher by killing him (4).

The defence of *property* against a thief may also sometimes afford grounds for homicide in self-defence, if he could not be prevented in any other way (5). However, much depends in such a case upon the circumstances from which it is to be judged whether or not death is to be attributed to homicide by negligence.

Homicide in self-defence may be committed not only in defence of one's own life but also of the life, property and chastity of children, wives, relations, friends, and

(1) Quistorp, § 235.

(2) Boehmer, *ad Const. Crim. Carol. Art.* 140.

(3) Leyser, *Medit. ad Pand. Tom.* 9, *Spec.* 600, *th.* 22.

(4) Putman, *Elem. Jur. Crim.* § 320.

(5) *Ibid.* *d. l.* § 321.

generally of any one who is unlawfully and dangerously assaulted (1).

Since there is a presumption in case of homicide that it was wilfully committed, a person who pleads homicide in self-defence must prove by direct evidence, or at least by proofs deduced from the circumstances surrounding the case, that he was in the exact position in which the law allows homicide in self-defence (2).

## SECTION X.

### Murder.

*What is murder, and in what respect does it differ from all other kinds of homicide?* The meaning of murder implies: *a*, that some one was killed or mortally wounded; *b*, that this was done with a premeditated and wilful intention; *c*, that the object of the person committing the act was to derive some gain or advantage from it (3). On account of the greater atrociousness of this crime, *breaking on the wheel* is usually selected as the mode of capital punishment (4).

## SECTION XI.

### Poisoning.

Under the aggravated species of homicide is classed the killing of a fellow-creature by means of *poison*. By this term is meant all such noxious things as produce injurious effects upon human life and health. An intention, however, of thereby depriving a person of

(1) Boehmer, *ad Const. Crim. Carol. Art.* 150, § 1.

(2) Carpzovii *Prax. rer. crim. Quæst.* 33, *ibique*; Boehmer, *in Observ.*

(3) Boehmer, *Elem. Jur. Crim. Sect.* 2, C. 17.

(4) S. van Leeuwen, *Cens. For. P.* 1, L. 5, C. 12 & 13.



his life or health is always essential (1). The punishment for poisoning is death, and indeed, a severe capital punishment, on account of the cunning and insidious intention as, e.g., *breaking on the wheel* (2).

Although this crime is a very serious one, yet there are also mitigating circumstances which may be taken into consideration: e.g., when the noxious effect of the poison is destroyed by timely assistance; when the poison has been prepared but not taken (3).

## SECTION XII.

In all ages to the present day the crimes of *parricide* Parricide and infanticide. and *infanticide* have been considered most atrocious species of homicide. In a broad sense parricide also comprehends the homicide of other blood-relations; such a relationship always aggravates the crime (4).

It is essential to the crime of infanticide that the child killed was born alive, and not prematurely. A decision on this point is arrived at from the condition in which the body of the child is found (5). Much reliance has always been placed upon a certain test: namely, whether the lung of the child sinks or floats in water. If it sinks when thrown into water, then the child was still-born; but if it floats on the surface of the water, then the child has breathed, and was therefore alive. For all that, although this test may be a very good ground of defence, it is

(1) Leyser, *Medit. ad Pand. Tom. 9, Spec.* 609.

(2) Boehmer, *ad Const. Crim. Carol. Art.* 130; Voet, *ad tit. ff. ad Leg. Corn. de sicar. n.* 14.

(3) Quistorp, §§ 264-266.

(4) Boehmer, *ad Const. Crim. Carol. Art.* 131, §§ 1 & 2.

(5) *Ibid. ad d. Art.* 131, § 3.



not sufficiently reliable and certain as a ground of accusation (1).

This crime may be committed through negligence as well as by directly taking away the life of the child: e.g., by not washing the child, but allowing it to be suffocated by its impurities; by withholding all nourishment from it; by not tying up the navel string, etc. (2).

Infanticide may be committed, not only in respect of children already born, but also upon those who are still in their mother's womb, if by violence or *by procuring abortion* the birth of the child is prevented (3). Under this crime may be classed the act of dangerously *exposing*\* new-born children. If this is done with the intention of causing the child's death, it is actual murder; if the child dies without any such intention it is homicide by negligence (4).

### SECTION XIII.

Punishment  
for parricide  
and infanticide.

Amongst the Romans the punishment for *parricide* was very severe. The person committing the act was sewn up in a sack with a dog, a cock, a viper, and an ape, left to the fury of these animals, and thus cast into the nearest sea or river (5). Amongst us this

(1) P. Camper, *Over de teekenen van leven en dood in nieuwe geborene kinderen* (On the signs of life and death in newly-born children) (Leeuw. 1774).

(2) Boehmer *ad* Carpzovii *Prax. Crim. P. 1, Quæst. 9, Obs. 5.*

(3) Boehmer, *ad* *Const. Crim. Carol. Art. 133.*

\* Concealment of birth.—Tr.

(4) Boehmer, *d. l. Art. 132.*

(5) J. F. Ramos, *Errores Triboniani de poena parricidii* (L. B. 1728).

punishment is not in use, but wilful parricides are punished by being broken on the wheel, and, where the intention was only indirect, by hanging on the gallows or decapitation by the sword (1). *Female infanticides* are strangled; and if the death of the child has been caused rather by negligence than wilfully, a special punishment: e.g., imprisonment, is inflicted upon them (2). The punishment for *procuring abortion* depends greatly upon the circumstances: how old was the *fœtus*? had it already shown any signs of life? did the mother do it of her own accord, or was she induced to do it by others? etc. According to all these circumstances the degree of punishment, generally corporal punishment, is determined (3). The same may be said of *exposing new-born infants*. If it was done with the intention of causing the child's death then an actual murder has been committed, and its punishment is death; but if this intention is not apparent, a special punishment is inflicted: e.g., imprisonment, corporal punishment or banishment (4).

#### SECTION XIV.

Although *suicide* is undoubtedly an unlawful act (5), *Suicide*. yet it cannot be classed under crimes which are

(1) Voet, *ad tit. ff. ad Leg. Pomp. de parric. n. 4.*

(2) Ibid. *d. l.*; Boehmer, *ad Const. Crim. Carol. Art. 131*, §§ 20-22.

(3) Boehmer, *ad Const. Crim. Carol. Art. 133*, § 7, *et seqq.*; S. v. Leeuwen, *Cens. For. Pt. 1, Lib. 5, C. 15, n. 5.*

(4) Boehmer, *d. l. Art. 132*; J. Moorman, *Verhand. van de misdaden en derzelver straffen*, 2 B. Ch. 7.

(5) J. Dumas, *Traité du Suicide* (Amst. 1773).

publicly punished (1). According to the very old customs of this country, the corpses of persons who had committed suicide were dragged on a hurdle, hung on a gibbet, and their property declared confiscated; but this custom has long since become obsolete (2), and they are only buried privately, without any ostentation.

## SECTION XV.

Crimes against  
the person.

Under *crimes against the person*, which we mentioned in the title of this chapter, may be classed the infliction of *wounds and personal injuries*, and also *duelling*.

Wounds.

We have already treated of cases where the wounds are mortal, but *wounds which are not mortal* are, according to the local statutes of a number of towns and villages (3), punished with a fine in addition to the payment of damages (4). If however the infliction of the wound is coupled with aggravating circumstances, and thereby falls under the class of crimes of violence, (*geweld*) it often affords a reason for inflicting a discretionary punishment.

Duels.

Provision has been made against duelling by several laws (5), and specially by the *Placaat of the States of Holland of the 22nd of March, 1657* (6). The substance

(1) *On the causes of suicide from a medical point of view* see L. Auenbrugger, *De inwendige razernij, of drift tot zelfmoord, als eene wezentlijke ziekte beschouwd* (Dordr. 1788).

(2) De Groot, *Int. 2 B. 1 D. § 44, Regtsg. Obs. 2 D. Obs. 23.*

(3) *Vide supra*, p. 151.

(4) S. v. Leeuwen, *R. Dutch Law*, 4 B. 35 D. n. 2 & 3.

(5) *Plac. 1 July, 1637, G. P. B. 2 D. col. 458; Plac. 20 May, 1641, G. P. B. 1 D. col. 391; Plac. 31 March, 1684, G. P. B. 4 D. p. 162.*

(6) *G. P. B. 2 D. col. 459.*

of this law is briefly : *a*, that no person may challenge another to a duel or, receiving a challenge, may accept it, upon pain of losing his office and paying a fine ; *b*, that the bearers of the challenge and the seconds are subject to the same punishment ; *c*, that every person who obtains any information of a challenge is bound to give notice thereof ; *d*, that persons who actually fight a duel and their seconds shall be banished from Holland for six years ; *e*, that the corpses of those who fall in a duel shall be buried in the evening or by night, without any funeral procession ; *f*, that if the person killed sent the challenge, his corpse shall be publicly exhibited ; *g*, that the person who kills another shall be punished with death, and no pardon or remission shall be granted to him.

#### SECTION XVI.

*Crimes against the reputation* of our fellow-men, Crimes against the reputation. otherwise called *injuriæ*, usually only give rise to a civil action for an *amende honorable et profitable*, as we have stated above (1). Simple defamation is seldom the subject of a criminal proceeding, unless concurrent aggravating circumstances call for it : e.g., if a person has circulated so-called lampoons, by which the crown or the members of the government are brought into contempt (2) ; if the defamation is coupled with any acts of violence (*geweld*) (3) ; when it is of such a nature that the public peace is thereby disturbed, just as in the case of persons who take the law into their own hands (4).

(1) Vide *supra*, p. 152.

(2) *Plac. Holl.* 7 March, 1754, *G. P. B.* 8 D. p. 570.

(3) Voet, *ad tit. ff. de injur. n.* 18.

(4) Groenewegen, *de Leg. abr. ad* § 1, *Inst. de vi bon. rapt.*



## CHAPTER III.

### ON CRIMES AGAINST THE PROPERTY OF OUR FELLOW-MEN.

#### SECTION I.

Crimes against property. THE persons who transgress against the property of their fellow-men are *thieves, robbers, defrauders, embezzlers of public money, legal practitioners who betray their clients, persons who cheat at play, bankrupts, usurers.* Let us briefly treat of each of them.

#### SECTION II.

Theft.

*Larceny*, or *theft*, is the taking away (lit., stealing) of any movable property, without the knowledge and against the will of the owner, with the intention of thereby benefiting either one's self or others (1).

*Theft* is either *simple* or *aggravated* (*gequalificeerd*). Aggravated theft is committed when it is coupled with house-breaking ; when the thief was provided with a gun and arms ; when theft is committed for the second or third time or more often ; if the stolen property was in a closed place (e.g., the stealing of fish in an enclosed pond, the stealing of fruit in gardens and orchards, the stealing of wood and the destruction of the plantation, the stealing of cattle from the pasturage) ; when theft is committed by members of the household or servants to whom the care and custody of the property were entrusted ; when it is committed by soldiers or watchmen ;

(1) Quistorp, § 341.

when property is stolen from persons who, in order to save themselves from fire and inundation, are busy securing their property. With respect to the *punishment for theft*, it is enacted by the laws in that behalf in force in this country (1): *a*, that all theft shall be punished the first time with flogging and branding, the second time with flogging, branding and banishment from Holland and West Friesland, and the third time with hanging: *b*, that theft accompanied by violence or house-breaking shall be punished with hanging; *c*, that the stealing of cattle, and the plundering of mills, pales, sluices, bridges, ploughs, waggons, and the like, shall be punished with death; *d*, that the purchasers of stolen property shall be liable to the same punishments. It is certain, however, that custom, confirmed by a number of decisions both of the upper and lower courts, has somewhat softened down the literal severity of this law, and that there are numerous instances where simple theft was punished only with flogging or even with some lighter punishment; and aggravated theft was punished not with death, but with a severe corporal punishment (2). With respect to the punishment for theft, the practice in this country is not uniform. In some places the law is very severe, and this crime is punished with hanging; in others again it is punished with severe corporal punishment (3).

(1) *Plac. Holl.* 16 Dec. 1595, and 19 March, 1614, *G. P. B.* 1 D. cols. 482 & 485.

(2) Compare on this point certain *Rechtsgeleerde Memorie*, to be found in the *Brieven over F. G. Meyer*, by Ds. J. Sharp (*Rott.* 1797), p. 128, *et seqq.*

(3) Voet, *ad tit. ff. de abig. n.* 4.

## SECTION III.

## Robbery.

The crime of *robbery* differs from theft in this respect, that it must always be accompanied by violence (1). Since, however, the degrees of the violence used may be very various, it follows of course that however much a violent robbery, especially if it is committed on the public highway or in a private house, deserves to be punished with death, yet sometimes in cases of mitigating circumstances a corporal punishment is deemed sufficient (2).

The *robbing of churches* and *kidnapping* are aggravated species of the crime of *robbery*. The *robbing of churches* (*sacrilegium*) is committed in respect of property or things destined for the exercise of public worship, and is committed in particular when alms given for the poor are stolen. Although, indeed, the superstitious ideas with regard to religion which formerly caused the persecution for this crime to incline rather to the side of excessive severity, have since given way to a more temperate mode of reasoning, nevertheless a crime of this nature is most certainly an aggravated offence, and must therefore be punished with severe corporal punishment proportioned to the circumstances of the case (3). *Kidnapping* (*plagium*) is committed when a person is hidden away in order to deprive him of his liberty. The punishment for this crime is generally flogging and branding;

(1) Boehmer, *ad Const. Crim. Carol. Art.* 126.

(2) Leyser, *Medit. ad Pand. T.* 8, *Spec.* 539; Voet, *ad tit. ff. de vi bon. rapt. n.* 4.

(3) Quistorp, §§ 385-390; Voet, *ad tit. ff. ad Leg. Jul. pecul. n.* 5.

may, indeed, in cases of aggravated circumstances, to be judged of principally by the motive for the concealment, death may be a suitable punishment (1).

#### SECTION IV.

The concealment of the truth with a wilful intention, and resulting in an injury to another person, is termed *fraud*, and the persons who commit this offence are termed *defrauders*. To constitute the crime of fraud two things are necessary: 1st, a wilful and criminal intention (2), which must be fully proved, or at any rate to a high degree of probability (3), because without this wilful intention the motives for the act may lie in a *mistake* or *misconception*, which is not punishable (4); 2nd, an actual injury to a third person (5). Hence, mere *lies*, wanting in the above-mentioned requisites, are not within the pale of the criminal law (6).

Fraud may be committed by negligence as well as by acts; by words as well as by documents and acts (7). It stands to reason that, according to the greater or less degree of the malice of the intention and the greater or less injury which is occasioned by the fraud, this crime may vary indefinitely in the degrees of gravity. Very grave, for example, is the offence of falsifying or

(1) Voet, *ad tit. ff. de Leg. Fab. de plagiar.*

(2) *L. 1, pr. L. 2, L. 23; L. 32, pr. ff. ad Leg. Corn. de fals.*

(3) *L. 18, § 1, ff. de probat. L.; 20, C. ad Leg. Corn. de fals.*

(4) *d. L. 20, C. L. 31, ff. eod.*

(5) *Arg. L. 23, ff. ad Leg. Corn. de fals.; Boehmer, ad Const. Crim. Carol. Art. 112, § 1.*

(6) Leyser, *Medit. ad Pand. T. 9, Spec. 594.*

(7) Boehmer, *Elem. Jur. Crim. Sect. 2, § 324.*



imitating the seals of the government or of a town, and the signatures of public officers (1), and, generally, the imitation of the signatures even of private persons deserves, on account of its consequences, a strict vigilance on the part of the judge. It is almost impossible to enumerate the endless variety of cases in which fraud may be committed (2). In a broad sense, one may include under this crime the wilful defrauding of the public revenue (3), and also all those acts which may be included under the general name of cheating (*bedriegerijën*) (4).

As the crime of fraud varies in its degrees of gravity so does its punishment, although the *Emperor Charles* has indiscriminately fixed hanging as the punishment (5); and although cases may certainly still happen in which, through a concurrence of aggravating circumstances, hanging might be considered as the punishment for a fraud, yet the general rule is that the punishment for fraud is discretionary (6), and that fraud is usually punished with flogging, with or without branding, imprisonment, banishment, or a fine (7).

(1) Quistorp, § 410.

(2) Voet, *ad tit. ff. ad Leg. Corn. de fals. n.* 6.

(3) This fraud, however, is punished with a fine, and only in cases of inability to pay with corporal punishment (*Gener. Ordon.* 28 Aug., 1749, *Art.* 4), unless the defrauding of the public revenue is accompanied by other crimes, e.g., perjury, falsifying of billets, passports, etc.

(4) *D. D. ad tit. ff. stellionat.*

(5) *Edict.* 30 Jan., 1545, *G. P. B.* 1 *D.* col. 383.

(6) Boehmer, *ad Const. Crim. Carol. Art.* 112, § 6; Boel, *Amst. Priv. & Poort. Regt.* p. 27.

(7) *S. v. Leeuwen, Cens. For. P.* 1, *L.* 5, *C.* 6, *n.* 4; Voet, *ad tit. ff. ad Leg. Corn. de fals. n.* 4.

SECTION V.

The crime of *embezzlement of the public money* is committed when a person to whose custody or supervision public money is intrusted, instead of applying it to its destined use, appropriates it, from avaricious motives, to himself (1). The punishment for this crime, in addition to making compensation for the money thus treacherously stolen, consists generally in loss of office, imprisonment, banishment, and the like (2). The fact that the public officer was bound by an oath, and therefore by committing this offence becomes guilty of perjury, tends to aggravate the crime.

Embezzlement  
of public  
money.

If persons placed in authority, or public officers, allow themselves to be *bribed* by presents and donations, to perform or omit duties which their office entails upon them, they are guilty of a crime (3). According to the aggravating or mitigating circumstances of this crime, the punishment is more or less arbitrary; loss of office, being declared infamous, banishment, fines, etc., are applicable in this case (4).

SECTION VI.

*Treachery towards a client*, or *prævarication*, is committed more especially by legal practitioners who, instead of carefully protecting and defending the rights of their clients, collude with the opposite party

Betraying a  
client's  
interest.

(1) *Crimen residui*. L. 4, § 4, ff. ad Leg. Jul. pecul.

(2) Quistorp, § 417; Voet, ad tit. ff. ad Leg. Jul. pecul. n. 6.

(3) t. t. ff. de Leg. Jul. repetund.

(4) Voet, ad d. t. n. 3.

and betray the cause (1). The punishment for this crime is more or less severe, in proportion to the malicious intention and the injury occasioned. Suspension or striking off the roll, banishment, fines, etc., may be considered as suitable punishments in such cases (2).

## SECTION VII.

Cheating at  
play and  
gambling.

Among offenders who are injurious to society are persons who *cheat at play*, whose conduct is often coupled with theft and fraud, and who are therefore punished even with corporal punishment or banishment where there are aggravating circumstances. Against *gambling*, in addition to the disability of suing for anything lost or promised on this account (3), provision has been made from time to time by general and local laws; usually by imposing fines or arbitrary punishments upon those who practise gambling or lend their houses for that purpose (4).

## SECTION VIII.

Bankrupts.

*Insolvents* and *bankrupts*, *per se*, are not strictly speaking criminally liable in our country. The punishment of death imposed upon them by the *Emperor Charles* (5) has never been put in force on

(1) *t. t. ff. de prævaricat.*

(2) Voet, *ad t. n.* 3.

(3) De Groot, *Introd.* 3 B. 3 D. § 49.

(4) *Plac. van den Hove van Holland* 27 April, 1723, 18 Jan., 1732, 10 March, 1749. *Handv. van Amsterdam*, 1 D. p. 115, & 2 D. p. 506. *Keuren van 's Hage van* 22 Dec., 1704. *Keuren van de Beverwijk*, Art. 18.

(5) *Edict*, 4 Oct., 1540, Art. 2, *G. P. B.* 1 D. col. 311.

account of its manifest absurdity ; although it would be desirable if some provision were made by a properly enacted law (1) against such destroyers of society. Proceedings therefore are only taken against them when they have been guilty of fraud, cheating, or some other recognised crime (2).

## SECTION IX.

With respect, lastly, to *usurers*, i.e., persons who exact exorbitant interest, and, further, generally all persons who practise *swindling*, their offence falls under the designation of cheating or fraud, and is therefore punished with a discretionary punishment, according to the circumstances of the case (3).

Usurers and swindlers.

## CHAPTER VII.

### ON CRIMES ARISING FROM INCONTINENCE.

#### SECTION I.

IN this fifth and last class of crimes, which have their origin in *incontinence* or *lust*, we include *adultery*, *polygamy*, *rape*, *prostitution*, *concubinage*, *sodomy* and *incest*.

Crimes arising from incontinence.

(1) Such a law exists, e.g., in Zealand, bearing date 27 June, 1776. *G. P. B.* 9 D. p. 529. In Holland they have never got beyond deliberating about it ; Zurek, *Cod. Bat. art. Bankeroutiers*, § 2, n. 3. However, in the *Ontwerp van het Lyfstraffelyk Wetboek*, 4 B. 4 C. a title on Criminal Bankruptcy has now been inserted.

(2) Quistorp, § 442 ; *Ordonn. voor de desol. boed. kamer te Amsterdam*, Art. 24, 36, 39.

(3) *Ibid.* § 449 ; Voet, *ad tit. ff. de usur.* n. 5.



## SECTION II.

## Adultery.

*Adultery* is the carnal connection between a married person, whether husband or wife, with any person other than his or her spouse (1). Adultery is committed either by two persons who are each already married to another, or by persons one of whom is married and the other unmarried. The former is called *twofold*, and the latter *simple* adultery. The crime of adultery arises from the violation of the obligatory conjugal fidelity. Thus it cannot take place in the case of persons who are, indeed, betrothed but not married (2), but it can in the case of persons who are separated *à mensâ et thoro*, as the nuptial tie is not thereby dissolved (3). The crime of adultery is consummated when the external acts which nature has prescribed for the union of the two sexes have been performed, although that which is necessary for impregnation may not also have taken place (4).

The punishment for adultery committed by two married persons is banishment for fifty years and a fine of one thousand guilders (£83 4s. 0d.); besides which the married man is declared infamous, deprived of his office, and rendered incapable of holding any for the future. The punishment for adultery committed by a married man with an unmarried woman is, in the case of the man, being declared infamous and being deprived of his office, and also a fine of four hundred guilders, for the first offence; and if repeated, a

(1) c. 15, *caus.* 32, q. 5.(2) Boehmer, *ad Const. Crim. Carol. Art.* 120, § 3.(3) Vide *supra*, p. 27.(4) Matthæus, *de Crimin. L.* 48, T. 3, C. 2, n. 7, 8, & 10.

double fine and banishment for fifty years; in the case of the unmarried woman, the punishment is being placed on spare diet (bread and water) for fourteen days for the first offence, and if repeated, banishment for fifty years. And if adultery is committed by an unmarried man with a married woman, the man is placed on spare diet for fourteen days and mulcted in a fine of four hundred guilders, and if it is repeated he is banished for ever; the woman in that case is banished for fifty years (1). On account of the difficulty of proving this crime (2) the public prosecutors are allowed to compound the punishments for it (3).

### SECTION III.

When a person during marriage wilfully enters into Bigamy. a marriage with another person, and carnal connection follows thereupon, this crime is termed *polygamy* or *bigamy* (4). The punishment for this offence consists, under aggravated circumstances, in flogging and banishment; in other cases the offenders are publicly exhibited upon a scaffold and then banished (5).

(1) *Pol. Ordonn.* 1580, *Art.* 15, 16, 17; *Plac. Holl.* 11 Sept., 1677, *G. P. B.* 3 D. p. 507.

(2) *Opinion of De Groot in the Holl. Cons.* 3 D. 2 vol. p. 707.

(3) *Resol. Holl.* 29 July, 1679, *G. P. B.* 7 D. p. 960; Van Alphen, *Papeg.* 2 D. p. 523. A wise and politic regulation in itself, if the composition were only at the same time confined within the proper limits of equity and moderation; but, in this respect, alas! upon how many public prosecutors may we not with feeling and regret impress the words: *Quid non mortalia pectora cogis, auri sacra fames.* No wonder, therefore, that nothing is heard of fines or composition in the *Ontwerp van het Lyfstraffelyk Wetboek*. This is also perhaps going a little too far.

(4) Boehmer, *ad Const. Crim. Carol. Art.* 121.

(5) *Regs. Observ.* 1 D. Obs. 10; V. D. Keessel, *Thes.* 62.

## SECTION IV.

Rape.

By the crime of *rape* is understood both the *forcible ravishing* and the *forcible carrying off* of a woman or maid *against her will*. The magnitude of these crimes depends very much upon the circumstances, which either aggravate or mitigate it. Among aggravated circumstances we may class the cases in which the rape is committed under the coercion of firearms or other weapons; on the public highway; upon a married woman or girl still unmarriedable, or upon a girl who is not in possession of her senses; by guardians, teachers, overseers, whose duty it was, on the contrary, to protect the chastity of the person ravished (1).

The punishment for this crime varies according to the different circumstances. Under aggravated circumstances the punishment of death may be applicable, in other cases an arbitrary punishment, proportioned to the greater or less degree of gravity of the crime (2).

## SECTION V.

Prostitution.

By the term *prostitution*, considered as a criminal offence, is understood the mode of living of those persons who, from a love of money or excess of wantonness, hire their bodies to another person for carnal purposes. Persons who induce women to do this, or who allow their houses to be used for that purpose, and obtain a livelihood by this means, are

(1) Boehmer, *ad Const. Crim. Carol. Art.* 118 & 119, & in *Obs. ad Carpzovii Prax. Crim. P.* 2, *Quæst.* 75.

(2) Voet, *ad tit. ff. ad Leg. Jul. de adult. n.* 2.

called *pimps* or *panders*. In many places in our country this crime is connived at, although provisions have been made against it by many laws; and as a rule it may be said that prostitution is generally regarded as a matter which, in scandalous cases, is looked after by the police, who, without many formal proceedings, are accustomed from time to time, whenever the offence becomes too public, to make a raid upon such houses, and to punish the keepers of brothels and prostitutes with temporary imprisonment or banishment (1).

#### SECTION VI.

If two unmarried persons, by virtue of a mutual agree- Concubinage, ment entered into either for life or for a fixed period, live and cohabit together as man and wife, although not married, it is called *concubinage* (2). Although according to the law of nature there is nothing unlawful in this (3), and although concubinage was a lawful intercourse among the Romans (4), it is, however, prohibited by the laws of our country for sound reasons of policy, and a fine of fifty guilders is inflicted upon each of such persons for the first month that they live and cohabit together, for the second month an additional fine of one hundred guilders, and for a longer cohabitation, banishment for ten years and an arbitrary fine (5). This law is properly construed in this manner, that

(1) Voet, *ad d. t. n. 1*; Zurck, *in Cod. Bat. art. Hoererije*; S. van Leeuwen, *R. H. R. 4 B. 37 D. n. 11*.

(2) Leyser, *Medit. ad ff. Tom. 9, Spec. 585*.

(3) Vide the authors mentioned by Meister, *in Biblioth. Jur. Nat. & Gent. T. 1, p. 82*.

(4) Heineccius, *ad Leg. Jul. & Pap. Lib. 2, C. 4*.

(5) *Pol. Ordon. 1580, Art. 3*.



it is only applicable to those persons who, after being previously warned and admonished to abandon this course of life, nevertheless persist in continuing it (1).

## SECTION VII.

**Sodomy.** The unnatural fornication committed by men with men or animals constitutes the abominable crime of *sodomy* (2): a crime so repugnant to all the laws of nature, of God, and the welfare of society, that it is enacted by an express act (3) that this crime shall be publicly punished with death (4), and that the corpses of the persons executed shall be immediately burnt to ashes and thrown into the sea, or exhibited upon a gibbet.

## SECTION VIII.

**Incest.** Lastly, among crimes arising from incontinence must be included *incest*, by which must be understood the marriage or carnal connection between persons who on account of their relationship are prohibited by law from intermarrying. The punishment for this crime

(1) Groenewegen, *de Leg. abrog. ad L. 2, C. de natur. lib. n. 7*; Brouwer, *de Jure Connub. Lib. 1, C. 27, n. 30*; Voet, *ad tit. ff. de concub. n. 3*.

(2) A. van Goudoever, *Dissert. de nefanda libidine. (Traj. 1731.)*

(3) *Plac. Holl. 21 July, 1730, G. P. B. 6 D. p. 604.*

(4) Although no person who has thought about it will be found unwilling to adopt the words of Montesquieu (*Espr. des Loix, Liv. 12, Ch. 6*): "God forbid that I should wish to mitigate the horror that every one feels towards a crime condemned alike by religion, morality and public policy," yet it has been doubted, and not without reason, whether death is really the proper punishment for this crime. *Bedenkingen over het straffen van zekere schandelyke misdad. (Amst. 1777.)*

varies according to the degree of relationship in which the parties stand to each other. Incest committed between parents and children is frequently punished with death. When committed between persons related collaterally or by marriage, corporal punishment, banishment, etc., is inflicted (1).

## CHAPTER VIII.

### ON EVIDENCE IN CRIMINAL CASES.

#### SECTION I.

WHAT we laid down above (2) with regard to the different kinds of proof of the dealings of mankind in civil cases, is to a great extent also applicable to criminal cases. However, in criminal cases there are some points with regard to the proof of crimes which deserve a special consideration.

As, according to the general rule, conclusive proof is required in order to sentence a person in a criminal prosecution, the evidence of two things is required to constitute such proof: *a*, that a crime has actually been committed, and *b*, of the person who committed the offence.

#### SECTION II.

The institution of a criminal proceeding depends first of all upon the certainty that a crime has actually

Evidence in criminal cases.

*Corpus delicti.*

(1) S. van Leeuwen, *Cens. For. P.* 1, *Lib.* 5, *C.* 28, *n.* 6, *ibique* De Haas, *in not.* Lybrechts, *Reden. Vert. over 't Not. Ambt.* 1 *D.* 11 *Hoofdst.* *n.* 10.

(2) 1 *B. Ch.* 17, *pp.* 154-162.

been committed, or, as it is expressed in other words, there must be proof of the *corpus delicti* (1). This proof may be established by following and examining the traces and marks which the commission of the crime has left behind : e.g., in homicide, the corpse of the person killed constitutes the *corpus delicti* ; in fraud, the instrument which has been forged. It is therefore the first duty of the judge to trace and examine the *corpus delicti* with careful accuracy, and, if necessary, with the assistance of experts. This consists specially in the viewing of dead bodies, in inspecting the indications of the commission of house-breaking and the like. But if the crime is of such a nature that its commission leaves no traces behind, which is the case in many crimes arising from incontinence, the commission must be proved by witnesses or clear proofs (signs) (2).

### SECTION III.

#### Confession.

After the commission of the crime has been proved, the question next arises, who committed it? In order to ascertain this there are the means of evidence by *confession, witnesses, written documents, or clear signs* (proofs).

The confession of the person himself who committed the deed is one of the principal proofs in criminal cases (3), provided its truth is confirmed by witnesses and by all the circumstances of the case. In order to constitute a conclusive and legally valid confession it

(1) *L. 1, § 24, ad S Ct. Silan. L. 16, C. de poen.* ; Boehmer, *ad Const. Crim. Carol. Art. 6, § 10, seqq.*

(2) Leyser, *Medit. ad ff. T. 8, Spec. 561, & T. 9, Spec. 598.*

(3) *L. 1, ff. de confess.*

is necessary : *a*, that there are sufficient proofs of the commission of the crime ; *b*, that it be made before the lawful judge—extra-judicial confessions create a presumption, but do not constitute conclusive proof (1); *c*, that it be simple, clear, not involved in obscurity, and voluntary (2)—it must therefore not be exacted by catch-questions, by putting words into the mouth of the accused, or by violent means; *d*, that the depositions taken by the judge with regard to the crime agree with the confession; *e*, that the particular circumstances stated by the accused in his confession be found true on further investigation (3); *f*, that the confession include such circumstances which it would be impossible for the accused to have known if he were innocent (4).

#### SECTION IV.

If the accused denies the crime he is charged with, Witnesses. either wholly or as far as the principal circumstances are concerned, or rests his defence upon matters which must be proved *aliunde*, the most common kind of evidence is that of witnesses. With regard to the latter, so far as the criminal law is concerned, the following points deserve to be noticed : *a*, The question whether a witness is to be deemed inadmissible or not may be best left to a sensible judge to decide himself (5). An objection to a witness is more easily overlooked by

(1) Boehmer, *ad Const. Crim. Carol. Art.* 32.

(2) *Ibid.* *d. l. Art.* 60.

(3) *Ibid.* *d. l. Art.* 54.

(4) J. G. Heineccii *Exercit. de religione judicantium circa reorum confessiones*, in *Opusc. var. Syll.* pp. 650–695.

(5) *L. 3, § 2, L. 13, ff. de testib.*; Leyser, *Medit. ad Pand. T. 4, Spec.* 283.



the judge when the evidence is produced in defence or in mitigation of punishment than when it is produced against the accused. *b*, All witnesses who cannot adduce any reason for knowing that which they have deposed to, or who are not in full possession of their senses, are wholly rejected. The effect of vagueness and uncertainty in the evidence or of the veracity of a witness being questioned is, that the witness is indeed admissible, but the weight of his evidence must afterwards be weighed and determined by the judge by comparison with the concurrent circumstances (1). *c*, No witness can give perfect proof in criminal cases unless he has attained the age of *twenty* years (2). Witnesses under that age\* are admissible, and their evidence may serve either to obtain information of the facts, or to strengthen other evidence and throw light upon it (3). *d*, Although negative evidence has not the weight of perfect proof, yet the contrary may be the case if the concurrent circumstances show that if the crime was really committed the witness must have discovered some traces of it, and if he cannot be considered to have any interest in concealing them (4). *e*, No evidence is admissible in criminal cases, especially in those of importance, except that given before the judge himself, who for that purpose usually addresses the witnesses by way of interrogatories, each of which must relate to a distinct circumstance, and be explained if necessary to the witness, if he does not appear to understand the

(1) Boehmer, *ad Const. Crim. Carol. Art.* 66.

(2) *L.* 20, *ff. de testib.*

\* The text says, "meerder jareen," but the reference to Carpzovius shews that this is a misprint.—Tr.

(3) Carpzovii *Prax. Crim. Part* 3, *Quæst.* 114, *n.* 41, *seqq.*

(4) Leyser, *Medit. ad Pand. Tom.* 4, *Spec.* 286.

meaning sufficiently. The answers of the witness must be noted down as nearly as possible in his own words. *f*, No testimony has the force of evidence unless it is confirmed by an oath (1). Evidence not under oath, the confirmation of which by oath has been omitted for reasons of prudence, only creates a presumption, but does not constitute proof.

## SECTION V.

*Documentary* evidence, although of daily use in civil Documents. cases, is less applicable in criminal cases, because no such instruments are executed in the case of crimes as in other transactions; and, should this happen, they serve chiefly to prove the *corpus delicti*. Yet sometimes extracts from records respecting the trials and sentences of accomplices, and letters written by the accused, or by others in correspondence with him, may serve as evidence; provided, however, as far as *documents of a private nature* are concerned, that the signature of the writer is acknowledged or proved (2).

## SECTION VI.

Evidence by means of *clear signs, indications*, or *Indicia*. *indicia*, has often been a subject of controversy among jurists, some admitting it, others rejecting it altogether (3). But these opposite opinions appear to be

(1) Boehmer, *ad Const. Crim. Carol. Art.* 70, § 4.

(2) Quistorp, 10 *Abschn.* 12 *Hauptst.* §§ 707-709.

(3) Leyser, *Medit. ad Pand. T.* 4, *Spec.* 257; Boehmer, *ad Const. Crim. Carol. Art.* 22, § 4, & *Art.* 23 & 24. *Deductie in Revisie, in de zaak van J. B. F. van Goch, Art.* 143-461, *en van den Hoofd-officier van Amsterdam, Art.* 203-863.

very easily reconcileable, if a proper distinction is only drawn between *suspicious*, *presumptions*, and *indicia*, and if the last-mentioned are confined to "such acts as are perfect proofs in themselves, and which cannot be true without the guilt of the accused resulting as a necessary consequence." And such proofs ought in our opinion to be held sufficient to fix the accused with the ordinary punishments prescribed by law for the crime (1).

## CHAPTER IX.

### IN WHAT MANNER THE LIABILITY FOR CRIMES IS EXTINGUISHED.

#### SECTION I.

How the liability for crimes is extinguished.

THE modes in which the liability for crimes is extinguished and criminal inquiries stopped may be conveniently reduced to the following: *punishment*; *the granting of pardon*; *compositie*; *submissie*; *prescription*; *death*.

#### SECTION II.

Punishment.

As soon as the criminal has suffered the punishment inflicted upon him after a proper inquiry and sentence by the judge, he is freed from all further prosecution on account of that crime (2), since it is contrary to justice that a person should be punished more than once for the same offence (3). Nevertheless, although

(1) Vide the above *Deductiën*, and the respective sentences of death in that case until confirmed in *Revisie*.

(2) *L. 7, § 1, ff. de jur. patron.*

(3) *L. 23, C. de poenis.*

the crime is put an end to by the punishment, it is not so completely wiped out but that if the offender again commits the same offence the punishment for this repeated crime is increased in severity in proportion to the former punishment already suffered (1); nay, thieves, tramps, vagabonds, persons disturbing the peace in the streets, who have once been punished for these crimes with corporal punishment, are debarred from appealing (2).

### SECTION III.

The liability for crimes is also extinguished when Pardon. they are *pardoned* by the Sovereign. Sometimes, from sound reasons of state policy, such a pardon is granted to a number of persons who have committed certain offences, chiefly those arising from the unhappy source of civil dissension, who are too numerous to be punished without injury to the state. Such an act of pardon is called an *Amnesty* (3). Sometimes it is granted to particular persons, not as an act of discretionary mercy, but on account of stringent reasons of equity, which would not permit the punishment of the law to be inflicted, under the peculiar circumstances of the case, without manifest hardship (4).

(1) *L.* 28, §§ 3, 10, ff.; *L.* 22, *C. de poenis. Pol. Ord. Art.* 3 & 16; *Plac. Holl.* 19 March, 1614, *Art.* 1 & 4, and a number of other laws.

(2) *Plac. Holl.* 17 June, 1718, *G. P. B.* 5 *D. p.* 764.

(3) Several examples are to be found in the *G. P. B.* 2 *D. col.* 2397, 3 *D. p.* 189, 517 & 518, 7 *D. p.* 840, 9 *D. p.* 420, 430, 433, 441, 444, 446, 448, 576, 578, & 816.

(4) Carpzovii *Prax. Crim.* P. 3, *Qu.* 150, *ibique*; Boehmer, in *Observ.* See further an *Advis. van 't Hof van* 8 Dec., 1784, to be found in my *Jud. Prac.* 2 *D. p.* 257, *et seq.*



The different kinds of pardon granted to particular persons in criminal cases are the following :

I. *Pardon*, which is granted in all kinds of crime except homicide, and always with a reservation to the party interested of the right to compensation.

II. *Remission*, granted in case of homicide or manslaughter; usually with the infliction of a fine to the Crown as compensation for the act.

III. *Abolition*, which takes place in all sorts of crimes, and operates as a complete acquittal by reason of a concurrence of very favourable circumstances either in respect of the person committing the act or of the act committed.

IV. Lastly, *Landwinning*, by which a person who has killed another in defence of his person is allowed to remain undisturbed in the country (1).

#### SECTION IV.

*Composite and  
Submissie.*

Although the granting of a pardon is the office of the Sovereign, and although the judge, however much bound in the determination of a punishment to pay attention to aggravating or mitigating circumstances, is obliged to follow the law (2), without being able to prefer mercy to the severity of the law (3), yet two means have been introduced in the administration of justice which are often used in alleviating the lot of the accused.

First, by the case being declared to be *civiel* and *composible*. This judicial declaration necessarily has

(1) *Judic. Pract. d. l. p. 272-274.*

(2) *L. 1, § 4, ad Sct. Turpil. Crim. Ordonn. 1576, Art. 56.*

(3) *Resol. Holl. 27 Sep. 1668, G. P. B. 3 D. p. 85.*

reference to such crimes to which the law affixes some further punishment than that of a fine (1), or which the public prosecutor is not expressly allowed to compound: as, for example, the crime of adultery (2). However, even in this respect the power of the judge is confined within certain limits, and compounding is never allowed in cases of grave crimes wilfully committed: e.g., homicide, when its commission is accompanied by deceit, homicide wilfully committed or otherwise aggravated, perjured evidence, falsifying coin, rape, and the like (3). The judge accordingly, before declaring a case, subject to corporal punishment, to be *civiel* and *composible*, ought to consider whether it appears from the circumstances of the case that the offender committed the crime more through inadvertence than from a malicious motive; for if the latter be the case, and if therefore the public interest demands that the criminal law should be enforced against him, it would be a matter attendant with evil consequences, and beyond the power and duty of a judge, to settle by the payment of a sum of money a crime to which the law, for the maintenance of public security, has affixed a corporal punishment (4).

The *second* way is by being received in *submissie* \*

(1) *Ordon. of the Emperor Charles*, 19 May, 1544, Art. 3 & 4; *Nader Ampl. Instr. van 't Hof* of 1644, Art. 30.

(2) *Resol. Holl.* 29 July, 1679, *G. P. B.* 7 D. p. 960.

(3) *Instr. Hof*, Art. 9.

(4) *Regtsgeel. Observ. over De Groot's Int.* 4 D. Obs. 40.

\* "Being received in *submissie*." The accused presented a petition, in which he confessed his guilt, and minutely detailed every mitigating circumstance, to the court. In the prayer he prayed to be received in *submissie*; in other words, he threw himself upon the mercy of the court. The petition was referred for consideration to the Attorney-General.—*Tr.*

by the judge, which means is made use of in cases in which the judge is in doubt as to whether they should be declared *civiel* and *composible*. But in this case also it is left to the discretion of the judge to decide whether or no this course is suitable. He ought, however, not to admit it in such wilful crimes in which it is to the public interest that they should be punished openly, and in order to deter other persons, with corporal punishment; but only in such crimes which cannot on account of their obscurity be easily unravelled, or which, owing to the concurrent circumstances, are more or less excusable (1).

## SECTION V.

## Prescription.

Just as the proceedings in real and personal actions become prescribed after the lapse of a certain time, so also *prescription* exists in criminal cases, if a certain time elapses after the commission of the crime without the person who committed it being charged therewith. It takes place in all sorts of crimes without exception (2), and requires a lapse of time of twenty years (3). The crime of adultery, however, has this peculiarity, that it becomes prescribed after a period of five years (4).

(1) Vide my *Judic. Pract.* 2 D. 4 B. 5 Ch. §§ 18-20.

(2) Leyser, *Medit. ad Pand. T.* 7, *Spec.* 515; Boehmer, in *Obs. ad Carpzovii Prax. Crim.* P. 3, Q. 141, *Obs.* 1.

(3) L. 12, C. ad Leg. Corn. de fals; L. 3, ff. de requir. reis.; L. 13, pr. ff. de div. temp. præscr.; Matthæi, *Paroem.* 9 n. 14.

(4) L. 29, §§ 5, 6, & 7, ff. L. 5, L. 28, C. ad Leg. Jul. de adult.; Voet, ad d. t. ff. n. 22.

SECTION VI.

Lastly, the liability for crimes is extinguished by <sup>Death.</sup> the death of the criminal, the effect of which is that no person can be charged after his death with the commission of an offence (with the exception of high treason and embezzlement of the public money (1)); nay, even should the accused die during the criminal proceedings, before sentence has been passed upon him, the case thereupon drops and is at an end, and cannot be proceeded with against his heirs contrary to their will (2), not even to recover from them the costs incurred by the prosecutor up to the time of the death of the accused; because in order to prove their liability for these costs the guilt or innocence of the deceased would have to be inquired into, and that cannot be forced upon the heirs against their will (3).

(1) Matthæus, *de Crimin. L.* 48, *T.* 19, *C.* 3, *pp.* 4-6.

(2) *L.* 15, § 4, *ff. ad SCt. Turpil.*

(3) Vide my *Memoriën*, concerning two interesting criminal points (*Utr.* 1791) and B. Voorda, *Aanteek. op de Crim. Ordon. Art.* 67.



### BOOK III.

#### ON THE MODE OF PROCEDURE IN CIVIL AS WELL AS IN CRIMINAL CASES.

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##### GENERAL CONTENTS AND DIVISIONS OF THIS BOOK.

Contents of  
this book.

IT is not enough to know what the rights are which men have against each other *in* or *to* certain things ; it is not enough to know what is necessary to constitute a punishable crime, and with what punishment each crime ought to be punished ; but after one has placed this methodical science on a firm basis, according to the true fundamental principles, one should proceed to inquire what is the proper form which must be adopted in order to obtain or maintain one's legal rights against other persons in civil cases, and what mode of inquiry must be deemed to be regular in bringing an accused person to trial, to punish him if found guilty, and to acquit him if found innocent. Every one feels that it is of great importance to the welfare of society that a proper order and regular form should be observed in both these cases, and we therefore intend to dedicate a special *Book* to the *practical* part of jurisprudence.

The mode to be followed in civil cases differs, however, very much from that which is adopted against persons accused of a crime. In order not to confound them with each other we shall divide this *Book* into two

*distinct Parts, one of which will contain the Mode of Procedure in Civil Cases, and the other the Mode of Procedure in Criminal Cases.*

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## PART I.

### MODE OF PROCEDURE IN CIVIL CASES.

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## CHAPTER I.

### ON THE VARIOUS JUDGES AND COURTS IN THIS COUNTRY.

#### SECTION I.

THE general rule in the institution of all suits is that the plaintiff must follow the court of the defendant (1), and that consequently no one can be sued in the first instance except before his ordinary, daily,\* and competent judge (2). The *College of Schepenen* must generally be regarded as such court in the towns and villages (3), at the head of which college there is generally a sheriff (*Schout*), whose duty consists principally in superintending generally the due administration of justice, to convoke the College of Schepenen, to hold the court, etc. (4).

*Schepenen,  
ordinary  
judges.*

59.

As the College of Schepenen, especially in the large

(1) *L. 2, C. de jurisd. omn. jud.*

\* I.e. the judge of his domicile.—TR.

(2) *Inst. Hof, Art. 220.*

(3) *Notable Deductie in de Holl. Cons. 3 D. 2 vol. Cons. 226, n. 19.*

(4) *Vide my Verhand. over de Jud. Pract. 1 B. 4 Ch. §§ 3 & 6.*

towns, was inadequate to settle all the cases which came before it, and as many of the small cases, often cases of importance, were delayed, inferior courts were established in various places (1). Thus, at *Haarlem*, there is an Inferior Court of Justice; at *Enkhuizen*, a Court for small cases; at *Rotterdam*, a College of Arbitrators, with jurisdiction up to 300 guilders (£25); at *Leyden*, a College of Arbitrators, before which all cases, without exception, must first be brought in order to attempt to bring about an amicable settlement; at *Dordrecht*, a College of Water-jurisdiction; at *Amsterdam* there are various Colleges of this nature, such as Commissioners of Matrimonial Causes, Commissioners of the Insolvent Estates Chamber, Commissioners of Insurance and Maritime Causes, etc.

## SECTION II.

Municipal  
matters.

The authority of the *Schepenen*, however, is only limited to cases which affect rights of private persons. They are incompetent to interfere with municipal matters; but the management and jurisdiction in all municipal matters, affecting both the administration of the town property and revenues, and the welfare and preservation of the towns, were formerly committed to the Corporation of *Burgomasters* (2), whose places are now occupied by the Corporations of Municipalities, Administrators, and Aldermen (*Raaden and Wet-houders*).

In the country municipal matters, and generally

(1) *Jud. Pract.* 1 B. Ch. 4, § 5.

(2) *Kort. Vert. van 't Regt der Ridderschap, Edelen, en Steden van Holland*, 16 October, 1587, G. P. B. 1 D. fol. 44.

matters relating to the marshes (*Polder-zaaken*), are committed to *Bailiffs*, and matters relating to the dikes and waters to *Dike Reeves* (*Heemraaden*) (1).

### SECTION III.

The upper courts in Holland at the present time are, the *Court of Justice* and the *National Court*.<sup>National Court.</sup> These colleges are judges either in the first instance or in appeal.\*

The power and jurisdiction (competency) of the *National Court* is limited to the following matters (2):  
*a*, It grants exclusively postponements of payment (*surceances*), writs of *sureté de corps*, and, further, all such dispensations as are committed to it by the Sovereign. *b*, It grants *writs of relief* in all proceedings pending before it. *c*, It has the superintendence over the administration of justice by all courts, judges, and tribunals, with power to quash their judgments, and to stay execution thereof, and in the last-mentioned case to transfer the case to another court or tribunal. *d*, It decides all questions of jurisdiction between officers and colleges of justice not subject to the same court, and also disputes between such High Court and a Lower Court in the same province (*département*). *e*, It adjudicates in the first instance upon all actions, both *petitoir* and

(1) *Jud. Pract.* 1 B. C. 4, § 7.

\* Each of these courts is termed a Hof, and the ordinary courts in the towns are called Gerechten. I shall translate Hof by High Court, and Gerecht by Lower Court.—Tr.

(2) *Instruct. van 't Nation. Gerechtshof*, Art. 42-53, *Staatsreg. van 1805*, Art. 78-86.



*possessoir*,\* in which the republic or government corporations, receivers and collectors of the revenue, or other government officers, are summoned in their respective capacities as defendants; and also upon all suits between the Government or its officers as plaintiffs and private persons as defendants, if they have expressly submitted to the jurisdiction of the High Court. It takes cognizance of and adjudicates upon all offences committed by members of the States General and the higher officials of the state, both crimes connected with their office, and other ordinary crimes.

To this court lies an appeal from all judgments in cases which were heard in the first instance in the provincial (departmental) courts.

#### SECTION IV.

Court of  
Holland, Court  
of first  
instance.

The *Court of Justice of Holland* takes cognizance in the first instance :

1. Of all suits between such persons who have no other daily † judge, and who are subject to the same provincial court: e.g., actions arising from the non-compliance with *letters requisitoriales*; ‡ questions of

\* The cause *possessoir* is a sort of provisional order, adopted for the purpose of obtaining provisional possession of and being placed in possession of anything in dispute, and of retaining such possession until the court in the action *petitoir* or principal case should otherwise decide. The action *petitoir* is brought for the purpose of acquiring the full right of dominion in anything in dispute by means of a final judgment (*Kersterman*).—Tr.

† I.e. judge of the domicile.—Tr.

‡ Vide *infra*, p. 291.

jurisdiction between towns and villages, and the like (1).

2. Of complaints of extortion and oppression committed by bailiffs and other public prosecutors in the exercise of their office (2).

3. Of actions in which members or officers of this court have to be summoned (3).

4. Of cases of persons who have no fixed abode, as, e.g., vagrants and tramps (4).

5. Of cases in which the rector or professors of the University of Leyden, or their widows, are defendants (5).

6. Of the cases of minors, widows, orphans, or other helpless (miserable) persons, if they elect to bring their complaints in the first instance before this court (6). This privilege, however, does not extend to short causes (7), or where those persons mentioned have obtained their right of action by transfer or cession (8).

7. Of *injuriæ* done to officers of the rank of counts and other privileged persons (9).

8. Of the fees charged by advocates and attorneys in cases conducted in this court (10).

(1) *Jud. Prac.* 1 B. C. 5, § 5, *Reglem. voor de Depart. Bestuuren* of 19 July, 1805, Art. 57.

(2) *Jud. Prac. ibid.* § 7.

(3) *Provis. Ordre*, 27 Sept., 1614, Art. 9.

(4) *Jud. Pract. ibid.* § 10.

(5) *Nad. Ampl. op het 39 Art. van de Statuten der Universiteit van Leyden*, 24 March, 1662.

(6) *Inst. Hof*, Art. 8.

(7) *Ordonn. op de kleine Zaaken*, 21 Dec., 1579, Art. 2, *Nad. Ampl. Instr. Art.* 2-7.

(8) *Ampl. Inst. Art.* 1.

(9) *Inst. Hof*, Art. 8.

(10) *Inst. Hof*, Art. 73; see further my *Verzam. van Gewijsden*, 1 D. Cas. 26.

9. Of crimes which have become prescribed and remain unpunished (1).

10. Of all cases in which the parties have expressly submitted themselves to the jurisdiction of this court (2).

11. In case a person gives out that he has a right of action against another, this court grants writs\* to *institute an action* (3).

12. Also *writs of purgation*, in case a rumour is spread about that a person has committed a crime of which he knows he is innocent (4).

13. So also *writs to hear execution decreed* in case of superannuated judgments, both of this court and of other judges in the province of Holland (5); and *writs to hear judgment passed*, if judgment in this court is confessed by any instrument, and, owing to the death of the person who confessed judgment or some similar circumstance, judgment cannot be given immediately, and without hearing the case.

14. If a person has several debtors for one and the same debt, living in different jurisdictions, he may summons them all together before this court in the first instance, in order to prevent a conflict of decisions (6).

15. This court takes cognizance in the first instance of all complaints of the disturbance of any right of

(1) *Inst. Hof, Art. 8, Jud. Pract. 1 B. 5 Hoofdst. § 15.*

(2) *Nad. Ampl. Instr. Art. 5 & 6.*

\* The word *mandament* I have translated by *writ*.—Tr.

(3) *Jud. Pract. ibid. § 17.*

(4) *Instr. Hof, Art. 8 & 225.*

(5) *Inst. Hof, Art. 118.*

(6) *Resol. Holl. 10 July, 1677, in de Papeg. 2 D. p. 221.*

possession, granting for that purpose writs of *spolie*, *maintenue* and *complainte* (1).

16. The jurisdiction of the High Court is also often founded by *writs of arrest*, when a foreigner is brought before the High Court by seizure of his person or goods (2).

17. So also by *penal writs*, by which a person is prohibited from doing any injury against the clear rights of some other person, and to prevent which the ordinary judicial means are insufficient (3).

18. In case of a denial of justice by an inferior judge, the High Court grants the *writ of evocatie* (4).

19. Also *writs of sauvegarde*, when a person is threatened by another with violent treatment (5).

20. The High Court also grants *letters of attache*, in order to execute throughout all Holland the judgments and writs granted by judges not within the province (6).

21. Lastly, the High Court grants the *writs of benefit of inventory*, *Acten van Diligent-houding*, writs of relief sent to the lower tribunals for confirmation, writs of *cessio bonorum*, *Atterminatie* or *Respyt* (7), and writs of *inductie* (8).

(1) *Instr. Hof*, Art. 8 & 39.

(2) *Merula, Man. van Proced.* L. 4, T. 2, C. 25.

(3) *Inst. Hof*, Art. 12.

(4) *Jud. Pract.* 1 B. 5 *Hoofdst.* § 27.

(5) *Van Alphen, Papeg.* 1 D. p. 511, & 2 D. p. 496.

(6) *Instr. Hof*, Art. 221.

(7) These were formerly granted by the Supreme Court, but on the abolition of that College they were transferred to the High Court of Holland. *Reglem.* 18 Sept., 1795, Art. 2.

(8) *Resol. Holl.* 24 Nov., 1581, G. P. B. 2 D. p. 1422.



## SECTION V.

Court of  
Holland, Court  
of Appeal.

In all the above-mentioned cases the Court of Holland has jurisdiction in the first instance; but it is chiefly a Court of Appeal. The general rule is that every person may appeal from judgments, sentences, decrees, or other orders, by which he considers himself aggrieved (1). However, this rule is subject to some exceptions, which deserve to be briefly mentioned here.

1. The High Court cannot allow an appeal from the *interlocutory judgments* of the courts of the towns, bailiffs and goodmen, or villages (provisional sentences being included), whatever the cause may be, not even upon an allegation of nullity or illegality, unless the execution of the interlocutory judgments would be irremediable upon final judgment (2).

2. No appeal lies to the High Court in cases not involving more than 100 guilders, and decided in walled towns, the Hague included, or in cases not exceeding forty guilders, if they are the judgments of the bailiffs and goodmen, or of the village courts (3).

3. No appeal lies to the High Court from judgments given in cases in which the process was criminal, extraordinary, and upon confession (4), unless an obvious illegality has been committed in the proceedings, or the punishment inflicted is grossly excessive (5).

(1) *Instr. Hof*, Art. 198 & 205.

(2) *Ampl. Instr. van't Hof van 21 Dec. 1579*, Art. 3; *Resol. Holl.* 19 March, 1622, in *de Papeg.* 1 D. p. 304; *Jud. Prac.* 2 B. 24 *Hoofdst.* § 2.

(3) *Plac. Holl.* 8 May, 1674, G. P. B. 3 D. fol. 704.

(4) *Resol. Holl.* 10 Sept., 1591, G. P. B. 2 D. fol. 1062.

(5) *Judic. Prac.* 2 B. 24 *Hoofds.* § 4.

4. No appeal lies in matrimonial cases in which the judgment accords with the contention of the parents, or the survivor of them (1).

5. On no account is an appeal allowed from judgments given by default, provided there has been no irregularity in the default or barring (2).

6. No redress can ever be obtained against the regulations made by the municipalities in municipal matters, by way of appeal to the High Court, inasmuch as this court is not competent to assume jurisdiction over, or to take cognizance of any matters of municipal polity (3). However, one ought not to include in this class orders of imprisonment and curatorship, granted by the aldermen (which is the practice in several places) (4).

Some judgments may, notwithstanding the appeal to the High Court, be put in execution upon security being given. Of this nature are the definitive judgments of the towns of Dordrecht, Haarlem, Delft, Leyden, Amsterdam, Gouda, and Rotterdam, not exceeding the sum of 600 guilders; those of the other walled towns, and of the Hague, not exceeding the sum of 300 guilders; those of the bailiffs and goodmen, not exceeding 120 guilders; and those of the courts of the villages, not exceeding 80 guilders (5). Judgments by which fines are imposed, and which do not involve any infamy or other seriously prejudicial consequence,

(1) *Resol. Holl.* 5 Dec., 1579, *Edict. Holl.* 27 Sept., 1663, *G. P. B. D.* p. 505; *Bynkershoek, Quæst. Jur. Priv. L. 2, C. 5.*

(2) *Jud. Pract. ibid.* § 7.

(3) *Resol. Holl.* 12 July, 1674, *G. P. B. 3 D. p.* 682.

(4) *Jud. Pract. ibid.* § 8.

(5) *Plac. Holl.* 8 May, 1674, *G. P. B. 3 D. fol.* 704.

are also, notwithstanding the appeal, executable upon security being given (1).

Although, lastly, an appeal lies from the judgments of the Court of Holland given in the first instance to the National Court, yet those judgments must be excepted from which no appeal was allowed to the Supreme Court, when that college was still in existence; such are cases for sums below 400 guilders, provisional and interlocutory judgments, simple or personal summonses, judgments in actions possessoir, orders and punishments of the High Court with reference to its internal regulation, and confessions of judgment (2).

#### SECTION VI.

Bailiff and  
goodmen.

Beside the Court of Justice of Holland there are also higher tribunals in various districts, particularly well adapted to have jurisdiction in criminal cases, but to which also an appeal lies from the inferior courts. Of this nature are the colleges of Bailiff and Honourable Men of *Rhynland* (3); of Bailiff and Liegemen of *Kennemerland* (4), of the Court or High Tribunal of *Delfland* (5), of the Bailiff and Goodmen of *Schieland* (6); and the Bailiff and Goodmen of *Zuidholland* (7).

#### SECTION VII.

Public revenue.

The courts of justice are especially prohibited from taking cognizance of matters affecting the public

(1) *Instr. Hof*, Art. 214, *Jud. Pract.* 2 B. 24 *Hoofdst.* § 13.

(2) *Jud. Pract. ibid.* §§ 15-20.

(3) S. van Leeuwen, *Cost. van Rhynland*, p. 60.

(4) Lams, *Handv. van Kennemerland*, p. 118.

(5) *Tegenw. Staat der Vereen. Nederlanden*, 6 D, p. 473.

(6) *Ibid.* 7 D. p. 7.

(7) *Ibid.* 7 D. p. 349.

revenue (1). Disputes affecting *export and import duties* formerly fell under the jurisdiction of the College of the Admiralty (2); now, of the *Court of Judicature of the Revenue by Land and Water* (3). Cases affecting the *excise duties and taxes* were dealt with in the towns in the first instance by *schepenen* as judicial commissioners of the revenue by land (4), from whose judgments an appeal formerly lay to committees of the States General, and afterwards to the provincial administration of Holland. As an entirely new system of taxation is now about to be introduced, the adjudication upon all matters relating thereto has been committed to the above-mentioned court of judicature, as the ultimate court of appeal (5).

#### SECTION VIII.

Where cases affecting military persons ought to be dealt with has at all times been a subject of great doubt, the solution of which varied very much, depending upon the fact whether there was *stadhouder* or not at the head of the government (6). Now the matter is settled in this way—military persons employed on land and on sea (*i.e., army and navy*) are subject to the civil judge as far as all civil lawsuits and ordinary offences are concerned, but they are brought before the high military tribunal for all military crimes (7).

Military  
matters.

- (1) *Nad. Ampl. Instr. Art. 31.*
- (2) *Plac. Gener. 31 July, 1725, Art. 202 & 203.*
- (3) *Instr. voor deezen Raad, van 12 July, 1805.*
- (4) *Gener. Ordonn. on 17 Jan., 1806.*
- (5) *Instr. voor gemelden Raad, Art. 20, n. 6.*
- (6) *Jud. Pract. 1 B. 1 Hoofd. § 8.*
- (7) *Staatsreg. of 1805, Art. 75 & 76.*



## SECTION IX.

Ecclesiastical  
matters.

Matters *purely ecclesiastical* must, according to the universal rule, be dealt with ecclesiastically, i.e., first by the Consistory, then by the *Classis*, and finally by the Synod (1). The temporal judge does not interfere with them, except in so far as the want of executive power on the part of the spiritual judge sometimes requires a stop to be put upon some improper proceedings. Nor does the political power interfere unless ecclesiastical quarrels rise to such a pitch that they would have a prejudicial effect upon the public security, or if they affect matters of *ecclesiastical polity*, in which last-mentioned cases the supervision formerly belonged to committees of the States General (2); and is now committed to the Secretary of State for Home Affairs (3).

## SECTION X.

Courts for  
special cases.

In conclusion, we must observe that there are, in addition to those above mentioned, some persons and cases subject to special courts.

I. Suits between parents and children, with regard to marriage, must be *summarily* disposed of by the *College of the Law*; so much so that, if the decision of that college is in accordance with the wishes of the parents, there is no appeal (4).

II. All suits connected with maritime matters and averages must be brought before the *Board of Maritime*

(1) *Jud. Pract.* 1 B. 1 H. §§ 3-6.(2) *Ibid.* § 7.(3) *Inst. voor denzelven*, Art. 2 & 20.(4) *Edict. Holl.* 27 Sept., 1663, G. P. B. 2 D. col. 3090.

*Law, or Commissioners of Maritime Causes*, who are to be found at Dordrecht, Amsterdam, and Rotterdam.

III. All suits relating to estates which have become *insolvent*, or which have been adiated under the benefit of inventory, or which have been administered under the direction and supervision of *schepenen*, must be disposed of by the judge of the place where the estate is situated, without the high court having the power of removing these cases on any pretence whatever (1).

IV. All matters relating to land and property must be determined by an *action petitoir*, in the place where the land is situate (2); for which purpose surveyors are appointed in several towns.

V. No cases relating to students, members of the *University of Leyden*, can be adjudicated upon by the high or other courts; because, according to the privileges granted to the university, the students cannot appear before any other tribunal than that of the university, in all personal actions, both in civil and criminal cases, whether as plaintiffs or defendants (3).

(1) *Resol. Holl.* 10 July, 1677, *G. P. B.* 3 D. p. 672.

(2) *Groot Privil. van Vrouw Maria van* 14 March, 1476, *Art.* 9.

(3) *Interpr. Holl.* 3 March, 1588; *Nad. Ampl. op het* 39 *Art. van de Statuten der Universiteit van* 24 March, 1662.

## CHAPTER II.

### ON THE INSTITUTION OF ACTIONS AT LAW IN THE FIRST INSTANCE.

#### SECTION I.

Friendly  
demand.

IF a person conceives that he has any claim against another, he ought first to apply to him for satisfaction in a friendly way, either verbally or in writing, or by a notarial demand, the last of which it is most advisable to have, as a satisfactory proof of the previous demand. If an action is instituted without such a previous demand, and the opposite side tenders satisfaction, the costs which have been incurred would not be obtained; but the opposite party would much rather be entitled to demand payment of the costs incurred on his side (1).

#### SECTION II.

Proper  
assistance.

Both the person who brings the action and the person against whom it is instituted must be competent to appear in court. Persons under guardianship or curatorship and married women are excluded from this qualification. If therefore an action is to be instituted by a minor, a prodigal, or the like, it must be brought in the name of his guardian or curator; and if one wishes to sue any such person, the guardian or curator must be summoned. There is no exception to

(1) Voet, *ad tit. ff. de re judic. n. 22*; Van Alphen, *Papeg. 1 D. p. 30, n. 7.*

this rule known to our law, except in extraordinary criminal proceedings, which are instituted by attachment or personal summons, in which case the rule applies that minors must appear personally in court in cases of serious crimes (1). But as soon as the criminal proceeding is converted into an ordinary proceeding they cannot appear in court without assistance (2). In the same way, if the case concerns a married woman, her husband must sue or be sued in the name of his wife.

The exceptions to this rule are:

1st. Women who are public traders.

2nd. Married women who have stipulated by antenuptial contract for the administration of their own property.

3rd. Cases where husband and wife sue each other for a separation, divorce, etc. (3).

Sometimes, however, it happens that the plaintiff or defendant is unprovided with that assistance without which he is not competent to appear in court. In that case a *curator ad litem* must be applied for by petition to the court before the suit is instituted.

### SECTION III.

If children conceive that they have any right of *Venia agendi*. action against their parents, they must first apply to the court for leave to sue them; which leave is termed

(1) De Groot, *Int.* 1 B. 4 D. § 1.

(2) S. van Leeuwen, *in not. op den stijl van Proc. in crimin. zaaken*, Art. 61; Voet, *ad tit. ff. de judic. n.* 12; G. de Haas, *in not. ad S. van Leeuwen*, *Cens. For. Part 2, L. 1, C. 10, n.* 12.

(3) *Regtsg. Observ. over De Groot's Int.* 4 D. Obs. 7.



*venia agendi* (1). In the inferior tribunals it is prayed for by a separate petition; in the high court it forms part of the petition for the writ.

## SECTION IV.

Advocates and  
attorneys.

If a person wishes to go to law, either as plaintiff or defendant, he would act most advisedly in engaging an *attorney*, or if the case is of some importance and somewhat complicated, in engaging an *advocate* and an *attorney*. Although, properly speaking, no person ought to be debarred from conducting his case in person (2)—and this often happens in some of the lower courts, especially in the country—yet it is prohibited by several lower courts (3), and especially by the High Court of Justice, in order to prevent confusion (4). No one is admitted as an advocate who has not taken the degree of Doctor of Laws at a recognized university (5), and who has not been sworn in as an advocate before the High Court of Holland (6). The profession of an advocate consists in general in advising upon all legal questions; in settling and signing all petitions; in drawing the pleadings, which must be filed, of record by the attorney; in drawing and signing all documents; in pleading orally in court; and, moreover, in using all

(1) *L. 4, § 1, L. 13, ff. de in jus voc.*

(2) *'t Groot Privil. van Vrouw Maria, Art. 6.*

(3) *Keur op het Proced. te Haarlem van 11 Sept., 1751, C. 1, Art. 7, Ordonn. op het Proced. te Amsterdam van 29 Jan., 1779, C. 3, Art. 6.*

(4) *G. Grotii, Isag. Lib. 1, C. 2, § 14; Ord. van den Hove van 2 April, 1672.*

(5) *Instr. Hof, Art. 71.*

(6) *Merula, Man. v. Prac. Lib. 4, Tit. 16, C. 1.*

legal means by which the case of the client may best be furthered (1).

The duty of the attorneys is to assist the advocates. The pleadings are filed of record in their name. They present the petitions and carry out the orders made thereon. They make fair copies of all the papers in the case. They instruct the advocates as to the dates and days of pleading upon which anything affecting the case has to be done (2). In most of the lower courts they draw the first two pleadings, viz., declaration and plea; in the Court of Holland the attorneys never plead. Their number is generally limited, that of advocates is not subject to any limitation. Before they can file any pleading of record they must be provided with a proper power of attorney (3).

## SECTION V.

As it is an expensive thing to go to law, and as it would be hard if a person having a just claim, but no money, should on that account be kept out of his just rights, poor and indigent people who cannot get an advocate or attorney to act gratuitously for them have an advocate and attorney appointed for them by the court, and such advocate and attorney are bound to act *gratis* and *pro Deo* for them (4). In order to obtain this *leave to sue pro Deo* a petition must be presented to the Court, accompanied by proof of the

Leave to sue  
*pro Deo.*

(1) *Inst. Hof*, Art. 55.

(2) G. Grotii, *Isag. Lib.* 1, C. 2, n. 14 & 15.

(3) *Inst. Hof*, Art. 52 & 53; *Ordre op de Rolle van 21 Oct.*, 1669, Art. 29.

(4) *Inst. Hof*, Art. 78.

poverty of the petitioner ; and the best proofs of this, in case leave to sue *pro Deo* is applied for to the Court of Holland, are letters of recommendation from the court of the petitioner's domicile (1). Such petitions may be opposed, either upon proof that the petitioner is not so poor as he pretends to be, or upon the ground that the intended action is clearly without foundation.

## SECTION VI.

Summons in  
the lower  
Courts.

The first step in the institution of all legal proceedings is the summons. For this purpose a summons (citation) is put in the hands of the messenger of the court (2), containing :

I. The name and capacity of the plaintiff.

II. The name and capacity of the defendant.

III. The day, hour and place at which the party is summoned to appear.

IV. A statement of the case upon which the defendant is summoned. Sometimes the statement is omitted from the summons, and a copy of the declaration is annexed.

The messenger serves the summons, and leaves a copy of it with the party summoned or some one of his household who has arrived at years of discretion ; or, in default of such person, with one of the defendant's neighbours who is willing to accept the summons for the defendant ; service having been effected, he makes a note of it, and annexes it to the summons. This is called the *return*.

(1) *Resol. van 't Hof, van 19 Sept., 1662, and 13 Oct., 1666.*

(2) *Ordonn. op 't Proced. in de Steden en ten platten Lande van 1570, Art. 1, en aldaar Van Leeuwen, in not.*

## SECTION VII.

In the lower courts, therefore, the summons takes place of one's own authority, and without the previous knowledge of the judge, but no summons can be taken out in the High Courts of Justice without the previous authority of the court to a process-server to do so. In order to obtain a summons, it is necessary to present a petition to the High Court, containing :

Petition for writ in the High Courts.

I. The name, residence and capacity of the petitioner, but no titles—however, e.g., Mr., Mrs., Honourable, may be added (1).

II. A concise, clear and well-connected statement of the case, and the grounds upon which the petition is based.

III. The conclusion or prayer, in which is stated what one wishes the opposite party to give or perform, in which, in case of opposition, there is a prayer for an order upon the process-server to give notice to the opposite party when he is to appear (2).

The petition, stamped and signed by an advocate and an attorney, is presented to the Commissioners of the Roll, who thereupon, as a rule, first order the parties to appear, in order to try if the case cannot be settled by an amicable compromise ; and, if successful, a deed of this compromise is drawn up in the presence of the Commissioners, which bears the name of *verbal accord* (3).

(1) *Ordonn. van den Hove van 8 June, 1663, in 't G. P. B. 2 D. col. 2926.*

(2) *Jud. Pract. 2 B. 1 Hoofdst. §§ 1-3.*

(3) *Ibid. §§ 4-6.*



## SECTION VIII.

Writ and  
sealed letters.

When the endeavours to arrive at a settlement are useless, and no reasons appear why the High Court ought to decline to take cognizance of the case, it grants the writ prayed for, which consists in an instrument drawn up in the name of the president and members of the court, which recites all the contents of the petition, and further authorizes the process-server to command and summons the defendant according to the prayer of the petition.

If any judicial order is sought against the government, or any very distinguished collegia, the court does not grant a *writ*, but a *sealed letter* (*besloten missive*), and the persons who are thereby summoned are not called defendants, but *conscripti* (*Beschrevenen*) (1).

## SECTION IX.

Process-servers  
in the High  
Courts.

In order to put the writs and orders of the High Court into force, a server of writs (*exploitier*) or process-server (*deurwaarder*) of the court is employed (2). These are of two kinds: viz., the *two first process-servers*, who attend the court daily, and serve the writs in the Hague, and within its jurisdiction; also several *ordinary process-servers*, some of whom reside at the Hague, and others in the various towns of Holland. The process-server in whose hands the writ is placed must repair, with his rod of office in his hand, to the defendant or his residence, and must explain to him the exigency of the writ, and, in case of opposition, must

(1) G. Grotii, *Isag. L. 1, C. 4, n. 11 & 12*; Bynkershoek, *de For. Legat. C. 16*, *Bell. Jurid. C. 31, p. 188, et seqq.*

(2) *Judic. Pract. 2 B. 2 Hoofdst.*

appoint a convenient day for him to appear: at the same time handing him a copy of the writ with a short minute of service endorsed thereon, containing a note of the service of summons, and of the day appointed for appearance. The day for appearance must be a *Monday*, and must be fixed at least *fourteen days*, or at the most *one month*, previously (1).

In the lower courts in the towns, and in the country, the service must be at least *three days* before the return day (2).

It may happen that the defendant in respect of whom the jurisdiction of the High Court has been founded by attachment, or in some other way, lives out of the jurisdiction of the court; in which case he is summoned by *edictal citation*: i.e., from the balcony of the Town House of the place situated upon the furthest boundaries of Holland, and nearest to the domicile of the defendant; where a copy of the writ is posted up, and another registered copy is sent to the defendant by the ordinary post (3). The return day in that case is fixed at three or four weeks, or longer, according to the distance at which the defendant is domiciled.

If a person domiciled in another place is to be summoned before the lower tribunals, it is not the practice to do so by edictal citation, but by *overdaging*,\* which is transmitted by letter requisitorial to the lower court, to be served there by the messenger (4).

(1) *Ampl. Instr. Art. 9, Reglem. van 28 March, 1680, Art. 6.*

(2) *Ord. op 't Proced. in de Steden, etc. Art. 1.*

(3) *Jud. Pract. 2 B. 2 Hoofdst. §§ 4 & 5.*

\* I.e. A summons by which a person is summoned before some court other than that of his domicile (Merula, 96 *in not.*).—TR.

(4) *Amsterd. Secret. 10 Hoofdst.*

Summons of  
persons un-  
known *edict* (*ad*  
*valvas curiæ*).

If the defendants or their abodes are unknown: e.g., if one prays for a writ declaring one to be entitled to the inheritance of a person who has died *intestate*, and since therefore each and every person who, apart from or together with one's self, might claim to have any right therein must be summoned, the summons of the defendants must be made from the balcony of the large hall of the High Court—or in the lower courts from the balcony of the Town or Court House—*six weeks* before the return day (1); and of this service notice is also given in the newspapers. This is called a summons by *edict ad valvas curiæ*.

## SECTION X.

Lodging the  
*presentatie*.

Before the return day the plaintiff's attorney must deliver a schedule to the registrar or secretary of the court, in which is written the names, residences and capacities of the parties, the name of the attorney, the Roll to which the case belongs, and the question which has to be dealt with in the case. This schedule is called a *presentatie* (2).

The Rolls.

In most places where not many actions are brought only one Roll is kept. In the High Court of Holland there are seven:

1. The ordinary Roll.
2. The extraordinary Roll.
3. The Roll of pleadings.
4. The Roll of decrees.
5. The *Furneer-Roll*.
6. The Roll of the Attorney-General in civil cases.

(1) *Ordonn. van den Hove van 10 Sept., 1732.*

(2) *Jud. Pract. 2 B. 3 Hoofdst. § 1.*

7. The Roll of the Attorney-General in criminal cases (1).

In *Amsterdam* there are the Court Roll, the ordinary Roll, the privileged Roll, the short Roll, the Roll of *induction*\* or *attermination*, *cessio bonorum* and benefit of inventory: the bailiff's Roll, the *Impost* Roll, and the extraordinary Roll (2). In *Haarlem* there are the bailiff's criminal Roll, the bailiff's civil Roll, the burghers' Roll, the marriage Roll, the extraordinary Roll and the May-Roll (3); and thus different places have their particular regulations upon this point.

## SECTION XI.

The case having been set down on the Roll, and the Declaration. return day having arrived, the attorney must file a *declaration* (*conclusie van eisch*). In the Court of Holland the claim is generally made by means of the writ. In the lower courts a statement of the case is first set out, which is followed by the conclusion or the claim. The framing of this claim depends both upon the nature and description of the action which is instituted, and upon the forms accepted in practice, which must always be modified and altered with sound judgment, according to the varying circumstances of cases (4).

This declaration, as well as all other pleadings, is

(1) *Jud. Pract.* 2 B. 3 H. § 2.

\* Vide *infra*, p. 317.

(2) *Ordonn. op de Manier van Proced. te Amsterdam*, van 29 Jan., 1779.

(3) *Keur op de Manier van Proced. te Haarlem*, van 11 Sept., 1751, Cap. 4.

(4) *Jud. Pract.* 2 B. 3 Hoofd. § 7, & 6 Hoofd. §§ 3-9.



generally concluded with the words "*or such other, etc.*" in order thereby to allow the judge to amend some uncertain or ambiguous expression or to supply anything wanting in the wording (1).

Minutes.

The attorney, on filing this declaration or any other pleading, gets the registrar or secretary of the court to make a short *minute* (*notul*) on the margin of the presentatie delivered by him: e.g., "*A. makes a claim, prays provisional judgment, and concludes prout in scriptis.*" He afterwards delivers a copy of the declaration to the attorney of the opposite side.

## SECTION XII.

Provisional sentence or *namptissement*.

It is often usual to add to the declaration a prayer for *provisional sentence* or *namptissement*, i.e., that the defendant may be condemned, pending the principal case, to pay the plaintiff the sum claimed by way of provisional sentence, under proper security that it will be repaid with interest at four per cent. if it be so held in the judgment in the principal case (2). In order to decide whether or not provisional sentence should be granted, the two following rules must be borne in mind:—

I. As to the plaintiff: "Provisional sentence ought never to be granted unless the plaintiff is provided with a liquid proof of his demand"—e.g., an acknowledged signature of the defendant's to a bond or other acknowledgment of debt; a merchant's account-book, when the sale and delivery are not denied—but the

(1) Voet, *ad tit. ff. de edend. n.* 13.

(2) De Groot, *Int.* 3 B. 5 D. § 7; S. van Leeuwen, *Aanteek. op het 10 de Art. van de Ordonn. op het Proced. in de Steden, etc.*

evidence of witnesses and other kinds of illiquid proofs are not sufficient for this purpose.

II. As to the defendant: "In order to oppose provisional sentence, the defendant must be prepared with such counter-proofs as appear to the judge of such weight that the probability of winning the principal case is against the plaintiff." In this case, therefore, so much does not depend upon the nature of the proofs as upon the conviction which they produce upon the mind of the judge. Provisional sentence is therefore properly refused to a swindler, although he produces an acknowledged signature of the defendant, if the latter adduces such proofs as to make it appear *very probable* (*lit.*, well-founded) to the judge that there has been some fraud and prejudice in the transaction (1).

The plaintiff who seeks provisional sentence usually delivers to the defendant copies of the documents upon which he bases his claim for provisional sentence, by means of the process-server or messenger. At the same time the summons is served, and then the defendant is bound to answer the claim for provisional sentence without delay upon the return day. If this delivery is not made when the summons is served, the defendant is at liberty to demand upon the return day, and before he answers to the claim, a copy and an inspection of that upon which the claim for provisional sentence is founded, and a day after delivery thereof (to prepare himself) (2).

(1) *Judic. Pract.* 1 B. 6 Hoofd. § 13.

(2) Van Alphen, *Papeg.* 1 D. p. 21, n. 5; Merula, *Manier van Proced.* L. 4, Tit. 24, C. 14, § 13, n. 29, *in not.*

## SECTION XIII.

*Comparuit* or  
default.

All that has been hitherto mentioned takes its usual course if the plaintiff and the defendant appear upon the return day. But what is the course if the plaintiff or defendant does not appear? If the plaintiff does not appear the defendant prays *comparuit*, and, as a consequence thereof, absolution from the instance with costs (1). And if the defendant does not appear the plaintiff prays *default*. The number and consequences of such defaults vary very much, according to the different kinds of actions. In some cases, which are summarily disposed of, *one* default is sufficient, in others *two*, and in others, again, *three* are required. In the ordinary action at law in the first instance four defaults are necessary. The benefit resulting from the first default is a second writ or summons. That of the second default is a third writ or summons. The effect of the third default is leave to file the *intendit*, and a fourth writ, or summons *ex superabundanti*, to see that it is verified. The effect of the fourth default is an order that a record thereof be drawn up, to be annexed to the *intendit*. By the *intendit* is understood a document containing a statement of the case, of the proceedings, and of the defaults granted therein; and finally the conclusion (or prayer), which always consists in this, that the defendant who is in default may be debarred from all exceptions, declinatory, dilatory, and peremptory, and also from all legal answers and defences, which he might have taken and availed himself of

*Intendit.*

(1) *Instr. Hof*, Art. 111; G. Grotii, *Isag. Lib.* 1, C. 7, §§ 33-35. Merula, *Man. van Proced. Lib.* 4, Tit. 31, C. 1 & 3.

and set up if he had entered an appearance; and, moreover, with respect to the action itself, that such judgment may be given against him as the nature and description of the action requires (1). This *intendit* and the documents, with an inventory thereof, are handed in to the judge. If the defendant appears upon the second or third summons he is allowed to make an application to *purge* the defaults which have been granted, to which the plaintiff usually consents, provided that their effect still continues and that the costs of the defaults already granted are refunded (2). Upon the fourth summons he is not allowed to do so unless he has obtained a writ of relief (3).

#### SECTION XIV.

Upon the return day, and if the defendant enters an appearance thereon, the usual practice is for him to accept a copy of the declaration, and to apply for a *day of deliberation*. In the lower courts this period extends to the next court day, and in the High Court to fourteen days. This is never refused to the defendant, unless a copy of that upon which the claim for provisional sentence is based was served together with the summons, and the defendant was therefore summoned to answer the claim without delay; or unless the court, for special and urgent reasons, orders the case to be brought to an issue on the first court day (4).

(1) Van Alphen, *Papeg.* 1 D. 5 *Hoofd.* p. 754, *et seqq.*

(2) Merula, *Manier van Proced.* L. 4, Tit. 33, C. 1, § 11.

(3) *Judic. Pract.* 2 B. 3 *Hoofd.* § 12.

(4) *Ibid.* 4 *Hoofd.* § 2.



Preliminary  
applications.

It very often happens that the defendant is not content with merely asking for a day to prepare himself, but before answering makes one or more *preliminary or præallable applications*. The principal of these are the following (1):

1st. Inspection and a copy of the power of attorney granted by the plaintiff to his attorney.

2nd. Copy of the capacity in which the plaintiff is described in the summons.

3rd. Copy of the documents which are mentioned, with the day and the date, in the writ or the declaration.

4th. Copy of that upon which the claim for provisional sentence is based.

5th. Copy of the return of the process-server or messenger who served the summons.

6th. Explanation or elucidation of obscure or uncertain expressions occurring in the writ or the declaration.

7th. Security for the costs of the action and security that the plaintiff will answer the claim in reconvention, submitted to the jurisdiction of the court in which the action is brought (2). This application is applicable when the plaintiff is a foreigner, not subject to the jurisdiction of the court. However, as it may often happen that the plaintiff is unable to obtain a surety subject to that jurisdiction, he offers, instead of personal security, the *security by oath*, i.e., he not only promises under oath to pay the costs if he should be condemned to pay them by the judgment of the court, but he also declares under oath, that after using every endeavour

(1) *Jud. Pract.* 2 B. 4 H. § 3, *et seqq.*

(2) Voet, *ad tit. ff. qui satisd. cog. n.* 1.

he has not been able to obtain any surety subject to the jurisdiction of the court (1).

8th. Election of a place within that jurisdiction where summonses may be served, or where executions may be levied. This also applies to the case of foreign plaintiffs, and it is generally called an application for *the election of the domicile citandi et exequendi*.

As the sole object of these applications is often only to throw the case over, it has become the rule in practice that they must be made on the return day, and all at the same time (2).

#### SECTION XV.

The *day for deliberation* having expired, the defendant is bound to *except* or to *plead*, and even, notwithstanding his exception, to answer the merits of the case. From this rule, however, are excluded such exceptions as may be taken without pleading over (3) namely :

1st. The exception of incompetency and want of jurisdiction (*renvoij*), if a person is of opinion that he has been summoned before a court wanting in jurisdiction, and that the case ought to be referred to some other court.

2nd. The exception of *lis pendens*, upon the ground that the same case, between the same persons and arising from the same cause, is already pending before some other court.

3rd. The exception of *lis finita*, upon the ground that the same case, between the same persons, has already

(1) Voet, *d. t. n. 4, in fin.*

(2) See my *Aanteek. op Merula, Man. van Proc. L. 4, T. 38, C. 1.*

(3) *Instr. Hof, Art. 88; Ampl. Instr. Art. 10.*

been decided and disposed of by a judgment which has acquired the force of law.

4th. The exception of subjection and submission to arbitrators.

5th. The exception of accord (*transactio*), upon the ground that the matter has already been settled by a compromise.

6th. The exception of award by arbitrators.

7th. The exception of abandonment (*desertie*), upon the ground that the time for appealing has already elapsed; or of concurrence and acquiescence, upon the ground that the appellant has, by an entire or partial satisfaction, abided by the judgment.

8th. The exception of non-admissibility of appeal, upon the ground that the judgment is not, according to law, subject to an appeal (1).

9th. The exception of want of capacity: i.e., that the plaintiff has not the capacity which he thought proper to ascribe to himself (2).

All these exceptions must be taken expressly and *nominatim*; but besides these there are also exceptions with no particular name; and in order to advance them a *plea (conclusie) for absolution from the instance* has been introduced into practice, which, among others, is often made use of in the court at *Amsterdam*. This is really only applicable when a person is of opinion that a wrong action has been instituted by the plaintiff (3).

(1) Van Alphen, *Papeg.* 1 D. p. 303.

(2) G. de Haas, *Nieuwe Holl. Cons.* No. 17, p. 285, *seqq.*

(3) Some persons are under the erroneous impression that the plea for absolution from the instance is applicable when it can be said, *tibi adversus me non competit actio*, because this affords a reason for joining issue; but it is only applicable when the defendant can say, *tibi adversus me non competit hæc actio*.

One cannot rely solely upon this plea, but the defendant is notwithstanding bound to plead over to the action itself (1).

## SECTION XVI.

If the defendant cannot take one of these nominate Plea or answer. exceptions, but believes that he is entitled to consider the plaintiff's entire claim as without foundation, and to deny it, he does so by concluding his plea with the prayer "that the plaintiff's claim against the defendant may be dismissed with costs" (2).

If, however, the plaintiff's claim cannot be confessed as it stands, but is good in one or more points, then the proper course is, not to answer that entire claim with the general issue, but the defendant would act prudently in making a tender to the plaintiff, when the pleading is filed at the Rolls, of what is really due to him. This is called a *præsentatie*, which he (the defendant) trusts may be deemed sufficient, relying at the same time upon the plea which he pleads over,\* as has just been mentioned (3).

## SECTION XVII.

When the time for pleading has arrived, and the Barring of defendant is in default, the plaintiff can compel him plea. to plead by applying at the Rolls for a *bar of plea*, the effect of which is that the *provisional judgment as*

(1) *Instr. Hof*, Art. 88; *Ampl. Instr.* Art. 10.

(2) G. Grotii *Isag.* L. 4, C. 9, § 10.

\* *Lit.* "At the same time relying upon that which he *further or otherwise* pleads."—TR.

(3) *Judic. Pract.* 2 B, 4 Hoofd. § 9.



*prayed for is granted* ; and, with respect to the principal case, *leave to file intendit, and another writ or summons to see it verified*, is granted. Sometimes also the effect is, *judgment for the plaintiff* as prayed ; namely, in cases which are summarily dealt with and in which only one default is necessary (1). These bars are usually granted in the High Court, saving the right to purge them within fourteen days, but in the lower courts they are generally peremptory.

### SECTION XVIII.

**Reconvention.** It often happens that the defendant has a counter claim against the plaintiff, in which case he may make a contra-claim, or *claim in reconvention*, against him before the same court, whose jurisdiction the plaintiff cannot challenge by way of exception (2). This (the claim in reconvention) is made before pleading, and in the same pleadings in which the defendant's plea is contained.

There are some cases, however, in which no claim in reconvention can be made (3).

1st. When the plaintiff does not sue on his own account, or in his own name, but on account of some other person ; whilst the claim in reconvention would affect him in his individual capacity.

2nd. If the court before whom the claim in convention is brought is, owing to the limitation of its jurisdiction, not competent to take cognizance of the claim in reconvention.

(1) *Judic. Pract.* 2 B. 4 Hoofd. § 11.

(2) Voet, *ad tit. ff. de judic. n.* 78, *seqq.*

(3) *Judic. Pract.* 2 B. 4 Hoofd. § 13.

3rd. In some possessory cases: e.g., no claim in reconvention can be made in the case of *complainte* and *spolie*.

4th. No claim in reconvention can be made on appeal, inasmuch as the inquiry of the Upper Court should be limited to the same question upon which the court below decided. However, it is granted upon good cause being shown, subject to the benefit of relief (1).

5th. No claim in reconvention can be made in cases of interdicts, but the defendant, if he believes he can obtain a penal interdict against the plaintiff, must institute a separate proceeding for that purpose.

6th. No claim in reconvention can be made in cases of execution or civil imprisonment (*gyzeling*);

7th. Nor in cases of *revisie*; \*

8th. Nor, lastly, in criminal cases.

## SECTION XIX.

When the defendant has answered the plaintiff's claim and has therefore taken exception to it or pleaded, with or without claiming in reconvention, it again becomes incumbent upon the plaintiff to file his defence at the Rolls. He therefore files an answer to the exception or the claim in reconvention; or, if the defendant has simply pleaded, a *replication*. In answer to this the defendant has another opportunity of pleading, which is called *rejoinder*; with that the *pleadings are closed*, and no further pleading is allowed (2).

Close of the pleadings.

(1) See my *Aanteek. op Merula*, L. 4, T. 43, C. 6, § 6.

\* New trial of case, heard by the highest court, p. 311.—Tr.

(2) Merula, *Manier van Proced.* L. 4, T. 46, C. 1.

Pleading in  
provisional  
cases.

If the plaintiff has included a prayer for provisional judgment in the action, it is first of all separately moved and decided upon oral pleading, the principal case being suspended during that time (1).

Substitution  
and interven-  
ing of parties.

It sometimes happens that some other person takes the action upon himself, instead of the original defendant, on account of the great interest which he has in the action—this is called *substitution*; or, while the original defendant remains a party to the suit, another person is joined, on account of his interest therein—this is called *intervening* (2).

## SECTION XX.

Writ of *debitis*.

A person who is entitled to sue another in the High Court in the first instance (e.g., a widow, a minor, etc.), and who has several claims against several debtors, ought properly, and according to the general rule, to take out a separate writ (*mandament*) against each debtor for each claim; but as many unnecessary costs are incurred in this way, the practice has been adopted, in order to diminish the costs, of applying for one general writ against all the different debtors, by virtue of which they may all be summoned before the High Court—this is called a *writ of debitis* (3).

(1) *Judic. Pract.* 2 B. 5 Hoofd. § 3.

(2) *Ibid.* § 4.

(3) Van Alphen, *Papeg.* 1 D. 2 Hoofdst. pp. 70-74; *Judic. Pract.* 2 B. 7 Hoofdst.

## CHAPTER III.

### ON CASES DECIDED IN A SUMMARY WAY WITHOUT INTERCHANGE OF PLEADINGS.\*

#### SECTION I.

IN the High Court of Justice there is little or no <sup>Long and short</sup> difference between long and short causes, and the <sup>causes.</sup> ordinance which was framed some time ago with regard to the procedure in short causes (1) has almost fallen into disuse. The only difference now consists almost solely in this, that cases involving less than 1000 guilders are neither argued orally in court nor in writing,† but are simply pleaded in the presence of both parties before two commissioners (2). In most of the small towns and in the country, long and short causes are treated on the same footing, to the great inconvenience of the inhabitants, who are merely saddled with excessive costs. In the larger and especially in the commercial towns this inconvenience has been felt and experienced, and therefore ordinances have been framed for the procedure in short causes, and here and there even separate *courts* have been established (3).

\* I.e., without serving copies of the pleadings and the documents in the case upon the opposite party.—Tr.

(1) *Ordonn. en Instr. op de vordenisse van kleine zaaken, van 21 Dec., 1579, in 't G. P. B. 2 D. fol. 692.*

† Some cases were argued orally, others in writing (*vide infra, p. 321*).—Tr.

(2) *Regl. van 't Hof, van 9 Maart, 1728, Art. 7.*

(3) *Handv. van Amsterdam, 2 D. 3 B. 4 Hoofdst. p. 671 & volg.*



## SECTION II.

Cases decided  
in a summary  
way.

Notwithstanding, however, this blending of long and short causes, there are some kinds of actions which do not admit of the formalities or the costs of an ordinary action at law, and are dealt with somewhat summarily—principally by not allowing the parties to produce or interchange pleadings—after the pleadings have been closed, by oral argument before two Commissioners of the Rolls. Let us run through the principal of these cases.

Bills of costs.

I. *Summonses to answer bills of costs.* An advocate or attorney, who cannot obtain payment from his client, simply prays for *an order for his fees* (1).

If the person who has been condemned in the costs has an attorney, a statement of the bill of costs is simply filed, and the defendant puts in a statement of the items he objects to; the applicant then puts in his counter-objections, and the court taxes the costs (2).

But if he has no attorney he is summoned to answer to the bill of costs. Having declared his willingness, on being condemned by the court, to do so, he files a statement of the items he objects to, as has just been mentioned. In this proceeding one default is decisive, the effect of which, and also of the bar of plea, is that the defendant is debarred from objecting to any of the items (3).

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*Ordonn. op de Vredemakers-Kamer te Rotterdam, van 6 Junij, 1635, & de Ampliatiën op dezelve. Keuren van Haarlem, 1 D. p. 33 & volg. Reglem. van het Collegie van Justitie in den Hage, van 11 Junij, 1795.*

(1) *Judic. Pract.* 2 B. 8 Hoofdst. § 2.

(2) *Ibid.* §§ 3 & 4.

(3) *Instr. Hof, Art.* 118 & 195,

### SECTION III.

#### II. Summonses to hear judgment passed.

Summonses to  
hear judgment  
passed.

When judgment is confessed by a notarial deed, and attorneys are appointed to apply for and to consent to it, no summons is necessary in order to obtain this judgment; but the attorneys appointed produce the deed to the judge adjudicating upon the case, who, if no good cause is shown to him to the contrary, grants judgment (1).

It may, however, happen that a summons must be issued in order to obtain judgment; viz., when the power of attorney is extinguished by the death of the person who has passed the deed; when the attorneys appointed are all or either of them dead; when the power of attorney is revoked by either of the parties repenting of his act; or when the judge, having some doubt as to the validity of the deed, has refused to decree judgment without hearing the opposite party.

In all these cases a writ is applied for or a summons to hear judgment passed is taken out, in which case one default is decisive, and its effect is that judgment is decreed according to the deed of confession, with costs (2).

### SECTION IV.

#### III. Summonses to hear execution decreed.

Summonses to  
hear execution  
decreed.

This takes place—

1st. When the judgment or sentence, by force of which execution should have been levied, has become

(1) *Judic. Pract.* 2 B. 9 *Hoofdst.* §§ 1 & 2.

(2) *Ibid.* §§ 3 & 4.

*superannuated*. The judgments of the High Court become superannuated after a lapse of five years (1). Those of the lower courts in the towns and villages after *one* year. The judgments at *Amsterdam*, however, do not become superannuated (2).

2nd. When the party condemned is dead, or has lost his *persona in judicio* by being placed under curatorship or otherwise. In this case, before the judgment can be put into execution, it must be declared executable against the heir or the curator.

It may also be remarked, that in order to have execution decreed upon a superannuated judgment of any lower court, it is not necessary to make an application to that court, but the application may be made directly to the High Court, which is competent (3) to grant a writ for that purpose, the effect of which is that, the execution being decreed, it may be put into force in the High Court.

The mode of proceeding in this case is the same as in the case of summonses to hear judgment passed, which we have spoken of in the previous section (4).

## SECTION V.

Summons to  
compel the  
institution of  
an action.

### IV. Summonses to *compel the institution of an action*.

If a person publicly asserts that he has a cause of action against me, but refrains from bringing it into

(1) *Ampl. Instr. van 21 Dec.*, 1579, *Art.* 30.

(2) *Certificaat bij forme van Turbe, van 7 Oct.*, 1592, in *de Handv. van Amsterdam*, 2 *D.* p. 557, *seqq.*; Loenius, *Decis. en Obs.* C. 62, *en aldaar Boel, in not.*

(3) *Instr. Hof*, *Art.* 118.

(4) *Judict. Pract.* 2 *B.* 10 *Hoofdst.* § 3.

court, the practice has been adopted of compelling him, either by applying for a writ or by taking out a summons, to institute that action which he believes he has against me within the period of six weeks, either in the High Court or in the court of my domicile; in default thereof to be debarred from doing so, and to be subjected to perpetual silence (1). In this proceeding two defaults are decisive. The effect of the first is that another writ or summons is granted, and the effect of the second is that the defendant is condemned to institute his action (2).

## SECTION VI.

### V. Summonses in case of *warranty*.

*Warranty.*

If a person has bought any immovable property, the dominium in which is afterwards claimed by a third person, or upon which a third person claims any mortgage, servitude, or other real right, which was concealed by the vendor, and the vendee is sued as occupier, he has the right to call upon the vendor to guarantee and indemnify him against this action (3).

This kind of cases is also summarily dealt with. They are pleaded orally at the Rolls, without any interchange of pleadings; and only *two* defaults are decisive, the effect of the second being that the defendant is condemned to give the warranty (4).

(1) Van Alphen, *Papeg.* 1 D. 5 Hoofd. p. 83, *seqq.*

(2) *Judic. Pract.* 2 B. 11 Hoofd. § 3.

(3) *t. t. ff. de eviction.*

(4) *Judic. Pract.* 2 B. 12 Hoofd. § 3.



## SECTION VII.

Summons to  
revive an  
action.

### VI. Summonses to *revive an action.*

If one of the parties to an action, whether plaintiff or defendant, should die before the case has proceeded to final judgment, it cannot be continued against his heir, unless he has been expressly summoned for that purpose.

This proceeding also falls under that class of cases which are orally pleaded after issue has been joined, at the Rolls, without the interchange of pleadings. *Two* defaults are decisive, and the effect of the second default is that the heirs of the defendant are debarred from being heard upon the matter at issue, which in the original action and upon the last pleadings was set down for that day (1).

## SECTION VIII.

To appoint an  
attorney to  
accept service.

### VIII. Summonses to *appoint an attorney to accept service.*

Just as the death of one of the parties to an action extinguishes the power of attorney given to his attorney, so the death of the attorney or his withdrawal from the further conduct of the case puts an end to the power. In this case the opposite side is under the necessity of summoning his opponent to have a new attorney appointed, against whom he can continue the action.

This proceeding stands on the same footing as that to revive an action, with this one exception, that only

(1) *Judic. Pract.* 2 B. 14 Hoofd. § 3.

one default is granted against the defendant (who, should he appear, cannot demand a day for deliberation) (1); the effect of which is that he is debarred from being heard upon the matter at issue set down for that day (2).

#### SECTION IX.

VIII. Writs of *evocatie*. If any one can prove that, either through partiality or some other cause, justice is denied him or unreasonably delayed in an action which he has pending in a lower court, he is at liberty to apply to the High Court by petition to have the action removed to that court. *Evocatie* (order to remove case from lower to Higher Court).

This petition is first transmitted by a sealed letter to the lower court, ordering the case to be decided within a short and fixed time, or to give reasons in writing for not doing so to the High Court. If this order is not complied with, the High Court transmits a second and similar letter, accompanied by a threat of removing the case. If all this is without effect, the writ of *evocatie* is granted (3). In this proceeding one default is decisive, the effect of which is that the case is considered to be removed.

(1) *Acte van Staaten van Holland, van 18 Dec., 1582, in 't G. P. B. 2 D. fol. 1422.*

(2) *Judic. Pract. 2 B. 15 Hoofd. § 2.*

(3) Van Alphen, *Papeg. 1 D. 13 H.; Judic. Pract. 2 B. 17 H.*

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## CHAPTER IV.

### ON ARRESTS AND PENAL INTERDICTS.

#### SECTION I.

When arrests  
take place.

ALTHOUGH it is the general rule that no one can be sued except before the ordinary competent court of his domicile, yet cases sometimes happen in which by means of *arrest* he may be taken out of such jurisdiction.

The grounds for an arrest may be of two kinds:—

I. Either as security for a debt—and in this case a suspicion that the debtor is running away is necessary, whether he is actually in the act of flying or whether he is preparing to run away (1);

II. Or, for the purpose of founding the jurisdiction of a court other than that of the domicile, which is resorted to in the case of foreigners (2).

#### SECTION II.

Privilege from  
arrest.

Some persons and cases are, however, privileged from being placed under arrest.

I. The persons, servants and goods of foreign ambassadors and ministers, who are in this country and contract any debt, cannot be arrested or delayed, either upon their arrival, or during their sojourn, or upon their departure (3).

(1) Voet, *ad tit. ff. de in jus. voc n.* 18, *ibique Supplem. nostrum.*

(2) Voet, *ad d. t. n.* 22 & 23; Bynkershoek, *de For. Legat. C.* 2.

(3) *Waarsch. van de Staaten General van 9 Sept., 1679, in 't G. P. B.* 3 *D. fol.* 310; Leonius, *Dec. & Ob. Cas.* 82.

II. The members of the Assembly of the States-General or any other *collegia* of the United Provinces (1), just as the deputies to the Assembly of the States of Holland (2), were formerly privileged from arrest. It follows as a matter of course that this privilege, since the change of Government, must be extended to the members of the present Assemblies of the States.

III. Two inhabitants of one and the same province, district, town or place, cannot arrest each other outside of such province, etc. (3). There are express treaties on this subject with respect to *Utrecht* (4) and *Zeeland* (5).

IV. Whether the inhabitants of the large towns of Holland can be arrested in the country is a doubtful question. According to the most generally accepted opinion there is no foundation for this exception, unless the inhabitants of a large town can show that by reason of some privilege they are freed from arrest: such privileges are granted to the towns of *Dordrecht*, *Delft*, *Leyden*, *Amsterdam*, and some others (6).

V. All persons who by reason of a privilege are only subject to the jurisdiction of a higher court: e.g., officers of the High Court, students of the universities,

(1) *Resol. Gener.* 27 July, 1635, *G. P. B.* 7 D. fol. 55; *Resol. Holl.* 3 May, 1680 and 3 April, 1723, *G. P. B. d. l.* fol. 65 & 66.

(2) *Resol. Holl.* 4 Oct., 1588 and 23 July, 1653, *G. P. D.* 7 D. fol. 54 and 55.

(3) Voet, *ad tit. ff. de in jus voc. n.* 45.

(4) *Verdrag tusschen de Staaten van Holland en Utrecht van 23 August*, 1657; Van Alphen, *Papeg.* 1 D. p. 351.

(5) *Provis. Accord tusschen Holland en Zeeland van 11 Junij*, 1674, *Art.* 5 and 8.

(6) Bynkershoek, *Quæst. Jur. Priv. L.* 1, C. 15; Van der Wall, *Handv. van Dordrecht*, 1 D. pp. 39-42 and p. 70; *Judic. Pract.* 1 D. 2 B. 18 H. § 2, n. 5, pp. 273 and 274.



and the like, cannot be arrested by other, and above all by lower, courts (1).

VI. Military persons, especially those going on active service, are also free from arrest (2). However, an *allowance* (*korting*) out of their pay may be applied for (3).

VII. No arrest can be placed upon the receivers, whether general or special, in the government accounting offices, upon bonds or annuities, or upon the interest or annual sums due thereon, and the receivers need not take any notice of such arrests (4). When, however, any bond has, *malâ fide*, got into the hands of a third person, then, in order to get it back, a petition may be presented praying that the bond may be stopped at the office of the receiver.

VIII. No arrests are allowed upon the moneys and assets of the bank of the town of *Amsterdam* (5);

IX. Nor upon the wages of seamen (6); nor upon the salaries and monthly wages of persons in the service of the East India Company (7).

### SECTION III.

Arrest in the  
lower courts.

The same formalities are not observed everywhere in the lower courts in issuing an arrest. Arrests upon goods are mostly laid by the person arresting of his own authority, by placing the necessary document in

(1) Voet, *ad tit. ff. de in jus voc. n.* 39 and 42.

(2) Ibid. *ad d. t. n.* 39.

(3) *Judic. Pract.* 2 B. 18 H. § 2, n. 7, pp. 274 and 275.

(4) *Waarsch. Holl.* 18 March, 1661, *G. P. B.* 2 D. col. 2639.

(5) *Octroij* 16 Dec., 1670; *Handv. van Amsterdam*, 2 D. p. 674.

(6) *Waarsch. Holl.* 8 Dec., 1653.

(7) *Octroij Holl.* 9 Meij, 1674.

the hands of the messenger (1). Arrests upon persons require the previous consent either of the lower court, of its president, or of the chief officer or sheriff, according to the local usage (2). In very many places it is the practice that all arrests which have been issued must be lodged within a short time with the lower court, on pain of becoming void (3). The practice in *South Holland* and the practice in *North Holland* differ in this respect, that in *South Holland*, in conformity with the practice of the High Court, no arrests can be made without a summons to answer the action in the first instance being served at the same time; whereas in *North Holland*, in conformity with the practice at Amsterdam, the arrest is made simply without issuing a summons, the person arrested, however, being entitled to call upon the person arresting to show cause for the arrest (4). If an arrest is laid upon the goods of a person whose domicile is situated in another jurisdiction, an application is made to the lower court, from which the arrest issues, for *letters requisitorial*, addressed to the court to whose jurisdiction the person arrested is subject, to summon him to appear (*overdagen*) before the first-mentioned court, and if the letters requisitorial are not complied with, then he is summoned by *edictal citation*, which is also called a *weet-brief* (5).

(1) Bort, *van Arresten* 3 D. n. 7.

(2) Ibid. n. 3, *seqq.*

(3) Van Leeuwen, *Cost. van Rijnland*, p. 197; Roseboom, *Keuren van Amsterdam*, C. 19, Art. 3, p. 73.

(4) *Ordonn. op het Proced. te Amsterdam*, van 28 Jan., 1779, C. 7, Art. 12.

(5) Bort, *van Arresten*, 6 D. n. 11-13, *Amsterdam Secret. Cap.* 9 and 10.

## SECTION IV.

Arrest in the  
High Court.

In order to take out an arrest in the High Court, whether personal or upon goods, a *petition for a writ of arrest, and in an action in the first instance (rau actie)*, is presented to the court, which contains, besides the above-mentioned (1), requisites for a writ in an action in the first instance, a short statement of the grounds upon which the petitioner believes that he is entitled to resort to this extraordinary remedy, and which concludes with a prayer that authority may be conferred upon the process-server to place the person or goods pointed out under arrest and *in custodia regis*, and that the person who is in possession of the goods which are to be attached may be ordered to submit and consent to the same; and also that the person arrested may be ordered and commanded to perform or to pay that which the petitioner believes he is entitled to claim from him, and that he may be summoned to answer the claim in case of opposition (2).

By virtue of this writ notice is given to the person arrested of an ordinary court day upon which he is to appear, which day, however, he may *anticipate* by simply giving twenty-four hours' notice to the plaintiff's attorney to file his declaration immediately (3). But an order of the court is necessary for shortening any of the other terms allowed for pleading.

(1) *Supra*, p. 265.

(2) *Jud. Pract.* 2 B. 18 H. § 3.

(3) *Nad. Ampl. Instr. van 24 Maart, 1644, Art. 26.*

## SECTION V.

The mode of proceeding in case of arrest is shortly as follows. In the High Court of Holland, and in conformity with its practice in several places, the person arresting, before filing his declaration, prays for *compliance with the writ (obedientie)*. To this the person arrested consents, saving all exceptions and defences; and the court condemns him to comply with the writ on these terms (1). After this the person arresting files his declaration, concluding with the following prayer: "That the arrest may be confirmed, and that it may remain in force and effect as having taken place properly and legally, and that the defendant may be condemned to submit to suffer the said arrest. That, moreover, the said defendant may be condemned to pay and satisfy the plaintiff, etc. And, lastly, that the goods attached may be declared executable for the plaintiff's arrears, with costs" (2).

Mode of procedure in case of arrest.

If the person arrested considers that he enjoys some privilege of being free from arrest, he may, without going into the merits of the case, take the *exception that the arrest is void*, and concludes with the prayer: "That the exception may be allowed, and that the arrest may be set aside, free of all expenses and damages, with compensation for expenses, damages and interest, with costs." But if he opposes the arrest because he considers the action in the first instance to be without foundation, he pleads to it, and concludes with the prayer: "That the plaintiff's claim may be

(1) *Manier van Proced. van 1729, Tit. 4, C. 3, and Tit. 5, C. 3.*

(2) *Judic. Pract. 2 B. 18 H. § 6, p. 282.*



dismissed, and that the arrest may be set aside free of all expenses and damages, and that the person arresting may be interdicted from doing the like again; and for compensation for all expenses, damages and interest already incurred and sustained, or still to be incurred and sustained by the defendant owing to the arrest, with costs" (1).

The person arrested is also entitled, without waiting for the judgment in the principal case, to apply to have the arrest set aside by way of provisional judgment, subject to security or bail. This is always granted, except in the case where a person has attached some property, in order that it may be reclaimed *in specie* as his own property (2).

If the person in whose hands the property has been attached does not enter an appearance, *default* is granted against him, the effect of which is a *certificate of relatie*, i.e., he is held to have tacitly consented to submit to the judgment which might be delivered between the person arresting and the person arrested, as to the confirmation or setting aside of the arrest. But if the debtor or the person arrested does not himself appear, then the effect of the default is the *continuation of the arrest until the end of the action*, i.e., that the arrest shall continue until the judgment in the principal case. More than one default is not required in case of arrest, and the three remaining defaults refer solely to an action at law in the first instance. The effect of a bar of plea in case of arrest is the same (3).

(1) *Judic. Pract.* 2 B. 18 H. § 6, p. 283.

(2) Bort, *van Arresten*, 8 D. n. 4 *et seqq.*

(3) *Judic. Pract.* 2 B. 18 H. § 7.

It also often happens that when an arrest is laid upon a person or goods, other creditors besides the one who first made the arrest come forward. These creditors may then apply that the person arrested shall not be set at liberty after the first arrest has been settled, but shall remain under arrest. This is called *recommendatie in den arreste* (1).

## SECTION VI.

*Interdicts* very closely resemble arrests. No person <sup>interdicts.</sup> has the power to place an interdict upon another of his own authority ; at any rate, if any person does so of his own authority he must rest content with the fact that, pending the action, it has no restraining power, but that it first began to operate when the court by its *judgment* interdicts the defendant as prayed for by the plaintiff. But nothing prevents the inferior courts also, often a summary inquiry, from granting *interdicts* to restrain the opposite party, pending the action, from continuing the act commenced.

Such interdicts may be resorted to in all kinds of cases. In the lower courts, however, they are chiefly resorted to to stay the prosecution of some new work (2) ; and the consent of the president of the *schepenen* or of the high sheriff is first applied for.

## SECTION VII.

The practice has been adopted, *inter alia*, if an interdict is desired against the commission of any injury, of <sup>Penal interdicts and their requisites.</sup>

(1) Bort, *van Arresten*, 2 B. n. 11-16 ; Van Leeuwen, *in not. ad* Peck, C. 17, n. 1, and C. 49, n. 5.

(2) *t. t. ff. de nov. oper. nunc.*

applying to the High Court by petition, which contains a prayer for a *penal writ (interdict)*, i.e., an order of the High Court, by which the person interdicted, and all other persons if necessary, are restrained from proceeding in any way with the injury commenced by him, or from causing it to be continued, either directly or indirectly, upon pain of forfeiting some large sum to the crown (by which is understood a fine of fifty caroli guilders); but by which, on the contrary, he is ordered to abate the injury, with all its consequences and appurtenances, as wrongfully and unlawfully committed, free of all expenses and damages, and is interdicted from doing the like again, and is also ordered to compensate the person applying for the interdict for all the expenses, damages and interest already incurred and sustained or still to be incurred and sustained by him, with costs. This is followed by the summons in case of opposition (1).

The requisites which are necessary to an application for an interdict are the three following:—

I. A clear right on the part of the applicant. If his supposed right is without foundation, it stands to reason that no restraint ought to be imposed upon the opposite party by an interdict; and if that right is doubtful, then the case is not a proper one to be decided simply by the interdict, as it were, without a complete inquiry and judgment. If, however, the thing against which an interdict is sought is of such a nature that its continuance would cause irreparable injury to the applicant, while on the other hand the discontinuance of that act would cause no irreparable injury to the opposite party, the interdict should be

(1) Van Alphen, *Papeg.* 1 D. 26 H.

granted, and an opportunity should be afforded to the applicant to maintain his right, which in all cases must have the greatest probabilities in its favour, by a more complete judicial proceeding (1).

II. An injury actually committed on the part of the person to be interdicted; at any rate a well-grounded apprehension that such an injury will be committed by him. If, therefore, either the person to be interdicted can show that the act committed by him is not inconsistent with the applicant's right, and is therefore no injury; *or*, that the apprehension of the commission of an injury has no foundation and is not proved; *or*, that there is no apprehension whatever that the injury which was once committed will be repeated in all these cases an interdict is improper (2).

III. That there is no other ordinary remedy by which one can be protected with the same result. Therefore an interdict should not be applied for to restrain the publication of the banns of marriage, as the remedy of forbidding the banns, the usual course in towns, is sufficient for this purpose. Therefore it is also improper to apply for an interdict to restrain the execution of a judgment granted by the lower court, but the ordinary remedy of *opposition to execution* (3) should be resorted to.

## SECTION VIII.

If the injury committed is of such a nature that the injured party would not be protected by restraining the repetition thereof for the future, but that the injury

*Autorisatie de facto.* (Summary interdict in a pressing matter.)

(1) *Jud. Pract.* 2 B. 19 H. § 1.

(2) *Jud. Pract.* d. l.

(3) *Ibid.*



ought immediately to be abated, he may, provided his right is indisputable, apply for *auctorisatie de facto* upon a process-server of the High Court to abate the injury without any form of process: e.g., to replace a child *de facto* under the power of his father; to eject a person *de facto*, and to cause the premises hired to be vacated; to release a person *de facto* from prison (1).

The applications are generally made to the High Court, and, in order to anticipate a repetition of the injury for the future, a prayer for an interdict is added; though, on the other hand, there is no reason why the lower courts also should not be able to confer such authority (*auctorisatie*) upon their court messengers.

#### SECTION IX.

Order upon an application for an interdict.

The interdicts which have been applied for by petition to the members of the High Court are never granted immediately, but first of all an order is made, appointing a day upon which the parties may be heard, and generally containing a clause that it should operate meanwhile as an interdict, until and including the day of hearing. Upon the day of hearing the application is generally opposed by the person against whom the interdict is sought, and is thereupon argued; after which the application is decided by a decree, which either grants the interdict or refuses it, in which case *nihil* is granted; nay, if the opposition appears to the High Court very well founded, the applicant is ordered to pay the costs incurred in the application: this is called a decree of *nihil cum expensis* (2).

(1) *Judic. Pract.* 2 B. 19 H. § 3.

(2) *Ibid.* § 5.

## SECTION X.

The mode of proceeding in case an interdict is granted is in most respects similar to that upon an arrest. The defendant may anticipate the day of hearing, by giving notice to that effect (*insinuatie*). Before the declaration is filed compliance with the writ (*obedientie*) is applied for and consented to. The prayer filed is "for a decree for the injunction and interdict as contained in the plaintiff's writ, in accordance with its form and tenor, and that it may remain in full force and effect, as legal and regular, and that consequently the defendant may be interdicted upon pain of forfeiting fifty caroli guilders to the crown, etc." The defendant in pleading concludes just as in the case of arrest, with a prayer that the claim might be rejected, and that the interdict granted may be set aside, free of all costs and damages, and for compensation of costs, damages, and interest. The effect of default is the continuance of the interdict until the conclusion of the action. The remaining defaults are only applicable if the collateral ordinary action in the first instance is gone into (1). The exception of incompetency cannot be taken to the claim in cases of interdicts (2) nor can a claim in reconvention be made (3).

(1) *Judic. Pract.* 2 B. 19 H. §§ 8 and 9.

(2) Van Alphen. *Papeg.* 1 D. p. 430.

(3) *Vide supra*, p. 278.

## CHAPTER V.

### ON LEGAL REMEDIES IN POSSESSORY CASES.

#### SECTION I.

*Immissie.*  
(Writ for  
obtaining pos-  
session.)

As we have already before (1) observed that various legal remedies have been adopted for *obtaining, retaining* and *recovering* possession, so we shall follow the same order in this chapter, as most convenient.

I. In order to *obtain* possession a *writ of immissie* is applied for, which is almost only applicable when a person is ousted from possession of the estate by a co-heir whose right is the same as his. The mode of proceeding is the same as that in the case of writs of *maintenue*, with which writs of immissie are often combined (2).

#### SECTION II.

*Maintenue.*  
(Writ for  
retaining pos-  
session.)

II. In order to *retain* possession a *writ of maintenue* is applied for. The Court of Holland is the competent court for this purpose (3). The petition which is to be presented for this purpose contains a short statement of the *possession* of the applicant and the *disturbance* by the opposite party; and upon these grounds a writ is prayed for by virtue of which the applicant may be maintained, sustained and confirmed in such possession as he considers himself entitled to; and by which moreover the opposite party may be

(1) *Supra*, p. 100.

(2) *Judic. Pract.* 2 B. 20 H. § 1.

(3) *Instr. Hof*, Art. 8 and 39.

ordered to remove, free of all costs and damages, all let, disturbance and hindrance of the said possession, and be prohibited from doing the like again, with costs (1). The summons follows after this in case of opposition. The prayer of the declaration is the same as the conclusion of the writ. To this a clause for provisional judgment is also added, which in this case is called *recredentie*. The defendant may also, besides praying in his plea that the claim may be dismissed, claim in reconvention, what is called *doubling the interdiction*. The case is closed upon pleadings just as in an ordinary action in the first instance: first the provisional claim (*recredentie*) is pleaded, and then the principal case (*in 't plenair possessoir*), after interchange by the parties of inventory and documents, is made ripe for judgment (2). In this case the defaults are *three* in number. The effect of the *first* is that *recredentie* is decreed, and another writ granted in the principal case. The effect of the *second* is permission to the plaintiff to file his *intendit*, and a third writ is granted to see it verified. The effect of the *third* default is a certificate thereof, to be annexed to the *interdict* (3).

### SECTION III.

III. In order to *recover* possession, an application is made to the High Court (4) for a *writ of complainte* (5). *Complainte.*  
(Writ for recovering possession.)

(1) Van Alphen, *Papeg*. 1 D. p. 117.

(2) *Judic. Pract.* 2 B. 20 H. § 3.

(3) Van Alphen, *Papeg*. 1 D. p. 117, *Judic. Pract. d. l.* § 4.

(4) *Instr. Hof*, Art. 9.

(5) There is a special treatise on this legal remedy by P. Bort, *Tract. van Complainte*, to be found in his *Works*, pp. 371-461. See also my *Judic. Pract.* 2 B. 21 H.



The person who wishes to obtain a writ of complainte must show :

1st. That he himself has possession, or that his predecessors, members of his family, or lessees had possession.

2nd. That this possession is quiet, peaceable and just.

3rd. That this possession has lasted for more than a year and a day.

4th. That the disturbance was committed within the year (1).

The writ of complainte consists in a commission to commissioners to summon the parties to appear at the place in dispute (*ter plaatse contentieus*), if they are satisfied of the possession and disturbance, and there to put the applicant in possession, and compel the defendant to cease the disturbance (2). Thereupon, the commissioners having repaired to the spot, the applicant makes his *demonstratie* if he thinks proper ; his witnesses are examined and heard by the commissioners, and then all the plaintiff's proofs are handed over to the commissioners. Next, the defendant is called upon to produce in writing what he has to say in answer (*contraria feiten possessor, destructive, of exceptive*), and to prove it ; for which purpose he also may make his *demonstratie* and produce witnesses. After the documents on both sides have been considered by the commissioners, they make an order as to the *restablissement*, i.e., a provisional replacing of the applicant in possession, free from the acts of disturbance

(1) *Instr. Hof*, Art. 39, *Instr. H. R. Art.* 195 ; Bort, *van Compl. Tit.* 5, n. 36, *seqq.*

(2) Van Alphen, *Papeg.* 1 D. p. 123, *seqq.*

by the respondent, until the High Court shall decide who is entitled to provisional *recredentie*. After this decree of *retablissement* has been granted and complied with, or even if the commissioners have not ordered *retablissement*, the ordinary summons follows, just as in the case of *maintenue*, and the same forms used in that case are observed (1).

#### SECTION IV.

IV. A possessory remedy, borrowed from the canon law, has been adopted in practice, if the disturbance was accompanied with forcible dispossession, which is known by the name of *writ of spolie*. It is nothing else than a possessory ordinary action in the first instance, to set aside the forcible dispossession, and to reinstate everything in the same position in which it was before the act of forcible dispossession was committed, with compensation of costs, damages and interest. In this case also a prayer for provisional judgment or *provisional restitution of the person forcibly dispossessed* may be added. The mode of procedure is very much the same as that in case of *maintenue*; and in this instance there are three defaults (2).

*Spolie*. (Writ on forcible dispossession.)

(1) *Judic. Pract.* 2 B. 21 H. § 4.

(2) *Ibid.* 22 H.

## CHAPTER VI.

ON THE PROCEEDINGS IN ACTIONS IN CASE OF  
APPEAL.

## SECTION I.

Different kinds  
of appeal.

THE question, what actions are or are not subject to appeal we have already discussed (1). In this chapter, therefore, we shall only state the mode of procedure which ought to be observed in case of appeal; and for that purpose we shall shortly treat of *reauditie*, *appel*, *reformatie*, *reductie*, and *revisie*.

## SECTION II.

*Reauditie*.

(Appeal to full  
bench from a  
lesser number.)

I. By *reauditie* is meant an appeal from a judgment or other decree delivered by less than the full number of the schepenen (2), or Commissioners of the Rolls in the High Court, to the full Collegium of Schepenen or the full bench of the High Court. It is in the nature and has the consequences of an appeal, with this exception, however, that it must be prosecuted within *three days* (3), which time must be very strictly observed. Before a person is heard in *reauditie* he must pay a fine into court, which in the High Court is ten guilders (4). The case heard in *reauditie* is brought to an issue in a

(1) *Supra*, pp. 254-257.

(2) *Ordonn. op 't Proced. te Amsterdam*, van 28 Jan., 1779, Cap. 8, Art. 25-32.

(3) *Ordonn. van den Hove* van 4 Julij, 1640, G. P. B. 2 D. fol. 1467.

(4) *Nad. Ampl. Instr.* van 24 Maart 1644, Art. 16.

very concise manner (1), and pleaded upon the same documents, and no new documents may be used (2).

### SECTION III.

II. *Appel* is an appeal from a judgment of an inferior to an upper court, with stay of execution of the judgment (*inhibitie*). *Appel*, and the time within which it must be prosecuted.

If a person is aggrieved by a judgment, which he seeks to have reversed by an appeal to the upper court, he must commence by noting his appeal (*interjecteren*). This must be done within *ten* days, to be reckoned from the delivery of the judgment, or from the time that it came to the knowledge of the person who has been aggrieved by it (3).

The appeal thus noted must be prosecuted within *twenty* days from the date of noting; and to such an extent that the *writ of appel* has been applied for and served within these twenty days (4).

These limitations of time for noting and prosecuting an *appel* are not observed so strictly, and upon a lapse thereof *relief* is readily granted (5).

### SECTION IV.

In order that a person in whose favour judgment has been given may not be left in an undue uncertainty

*Anticipatic and desertie.*  
(Orders to compel the noting and prosecution of an appeal.)

(1) *Judic. Pract.* 2 B. 23 H. § 5, p. 322.

(2) *Ordonn. van den Hove* van 21 Feb., 1584, G. P. B. 2 D. p. 2160.

(3) *Ordonn. op 't. Proced. in de Steden en ten platten Lande*, Art. 21; *Instr. Hof*, Art. 198.

(4) *Instr. Hof*, Arts. 204, 206.

(5) *Groenewegen, de Leg. abrog. ad L. 3, C. de temp. et repar. appel.*



whether the opposite party still intends to proceed with his appeal by means of *relief*, two legal remedies have been adopted in practice, viz.: *writ of anticipatie*, and *writ of desertie*.

If the case is of an urgent nature and does not admit of delay : e.g., in matrimonial causes, arrests and the like, a petition is presented to the High Court, praying that the appellant may be ordered to state his alleged grievance by a certain fixed day, and to file his claim in appeal, or that in default thereof the appeal may be declared abandoned. This is called a *writ of anticipatie*. Its effect is that the appellant, without being allowed to oppose it, must immediately, or at any rate within *eight days* after, file his claim in *appel* at the Rolls or he is entirely debarred therefrom. If the appellant does not appear to answer to the summons served upon him by virtue of this writ, the effect of the default is that the appeal is at once declared abandoned (1).

If the party who has noted an appeal neglects to prosecute it, and the case is not really of a particularly urgent nature, the opposite party may, in order to rid himself of this uncertainty, after the lapse of time fixed by law, either execute the judgment, whereupon the appellant is bound to come forward, or apply to the High Court for a *writ of desertie*, by virtue of which he obtains a judicial declaration that the time for appealing has lapsed (2).

## SECTION V.

Mode of procedure on appeal.

In order to prosecute an appeal which has been noted, a petition is presented to the upper court, containing :

(1) *Judic. Pract.* 2 B. 27 H.

(2) *Ibid.* 2 B. 28 H.

1st. A history of the case which gave rise to the action.

2nd. A statement of the proceedings which have taken place, and,

3rd. Of the judgment delivered by which the party considers himself aggrieved (1), upon which grounds a *writ of appel* is then prayed for.

This contains :

1st. Authority granted to the process-server to summons the respondent either to hear the judgment reversed, to support it, or to renounce the benefit thereof, as to him shall seem meet.

2nd. Also an *intimation* to the judge who delivered the judgment to appear to support it, if he shall think proper to do so.

3rd. *The clause by which execution is stayed (inhibitie)*—that is, to prevent any steps being taken in the case pending appeal; and if that has already happened, to reinstate everything in its former position (2). These are the usual contents of writs of *appel*. Sometimes, however, they contain special clauses (3): thus there are the *clause of relief*, by which a party is entirely relieved against the lapse of the time fixed by law for noting and prosecuting the appeal; the *clause compulsory*, by which the registrar of the lower court which delivered the judgment is ordered to issue a copy thereof, or also to deliver copies of the documents in the proceedings; the *clause calling upon the respondent to support the judgment upon the return day without further proceedings (anullatie ilico)*. This is

(1) *Judic. Pract.* 2 B. 24 H. § 24.

(2) Van Alphen, *Papeg*. 1 D. p. 296.

(3) *Judic. Pract.* 2 B. 24 H. § 24.

applicable when the judge has so grossly erred in the framing and form of the judgment that it is void at law (1); the *clause calling upon the respondent to show cause on the return day why the steps taken upon the judgment should not be rescinded*, i.e., to rescind immediately all steps taken, pending the appeal, it not having been declared abandoned.

No one is heard in *appel* in the High Court unless he has paid into court, at the time of taking out the writ, to the paymaster of the writs a fine of *forty guilders*, which is returned to the defendant if the judgment is reversed by the upper court, but if the judgment is confirmed, the sum is at the same time declared forfeited to the government (2).

Upon the court day fixed for the *appel*, the appellant files his claim that the judgment may be annulled, and that the High Court, doing that which the court of first instance should have done, may allow or dismiss the claim filed in the court of first instance, with the costs of appeal and in the court below (3). If the respondent in *appel* considers that the case is not appealable, he does not enter into the merits of the case, but takes the *exception of not admissible in appeal*, upon which first of all issue is joined and judgment is given; but if this exception is not applicable to the case, the respondent files his plea in *appel*, and adds thereto a statement of the case and the proceedings, as he thinks they ought to be stated from his point of view, and concludes by praying that

(1) *t. ff. quæ sent. sine appell. rescind. ibique D. D. in Comment.*;  
S. Vantius in *Tract. de null. Process. ac Sentent.*

(2) *Nad. Ampl. Instr. van 24 Maart, 1644, Arts. 9, 10, 13, 14.*

(3) *Judic. Pract. 2 B. 24 H. § 26.*

upon these grounds it may be declared that the appellant is not aggrieved by the judgment in question, with costs (1).

As the judgment is sometimes partly against and partly for the appellant, and as therefore the respondent may also consider himself aggrieved thereby, the latter may, without entering a separate *appel*, state his grievance by way of a sort of reconvention. This is called in practice *to advance grievances à minima* or to *claim à minima*. After all this, the case is brought to an issue upon a *persistit*, which takes the place of rejoinder and replication (2).

If the respondent does not enter an appearance, the proceedings taken against him involve *three* defaults. The effect of the *first* default is another writ, the effect of the *second* is that the judgment is reversed and the applicant is allowed to file his *intendit* as of first instance, and a third writ is granted to him to see the *intendit* verified. The effect of the *third* default is a certificate thereof to be annexed to the *intendit* (3).

## SECTION VI.

III. Another kind of appeal bears the name of *Reformatie*. *reformatie*. This course is adopted when the judgment (Review where no appeal lies.) by which a person considers himself aggrieved is of such a nature that, owing either to the smallness of the amount involved or for some other reason, it does not admit of an *appel* (4) or when no execution can be

(1) *Judic. Pract.* 2 B. 24 H. § 27.

(2) *Ibid. d. l.*

(3) *Ibid.* § 28.

(4) *Vide supra*, p. 254.



levied upon the judgment: e.g., when the plaintiff's claim is dismissed with costs. The mode of procedure in this case is the same as that in *appel*. The difference between these two legal remedies consists principally in the following:—

1st. *Appel* has a staying power, so that judgment cannot be in the meantime *executed*. *Reformatie* does not prevent the judgment from being executed in the meantime, upon security being given (1).

2nd. The time within which an *appel* must be prosecuted is twenty days after noting. *Writs of reformatie* must be applied for within a year (2).

3rd. The fine to be paid into court upon an *appel* is forty guilders: upon a *reformatie* only twenty guilders (3).

## SECTION VII.

*Reductie.*  
(Setting aside  
an award.)

IV. If the judgment by which a person considers himself aggrieved is not a judgment of the ordinary judge, but the award of *arbitrators* or goodmen, the appeal is called *reductie*. This always lies (4), except in cases where the *compromis*, or deed of submission, contains a clause for confessing judgment, and judgment has actually been granted. The noting of a *reductie* is done by notarial instrument, and notice thereof is given to the opposite party by *insinuatie* (5). Although it is by no means clear that *reductie* does not lie to the ordinary judge (6), yet the practice is to

(1) *Instr. Hof, Art.* 212.

(2) *Ibid. d. Art.*

(3) *Nad. Ampl. Instr. van 24 Maart, 1644, Arts.* 9, 10.

(4) *Ibid. Art.* 20.

(5) *Judic. Pract.* 2 B. 26 H. § 1.

(6) Voet, *ad tit. ff. de recept. n.* 27.

apply to the High Court for a *writ of reductie*. The mode of procedure in this case is exactly the same as that adopted in *appel* and *reformatie*.

## SECTION VIII.

V. The last kind of appeal is the remedy of *revisie*, *Revisie*. (New trial of case, heard by the highest court.) by which is meant an application made by a person who considers himself aggrieved by a judgment of the highest court, to have the proceedings heard *de novo*, before the same collegium, with the addition of a certain number of persons (*adjuncten reviseurs*), who are specially appointed for this purpose in the name of the sovereign (1).

No *revisie* is allowed of interlocutory orders or judgments, or of provisional sentences, which are remediable upon the final decision of the case; nor of confessions of judgment, nor of judgments in possessory cases. *Revisie* is never granted *pro Deo* in civil cases, nor in criminal cases unless the prisoner has been sentenced to corporal punishment, and one-fourth of the votes of the court were in his favour (2).

*Revisie* must be noted within six weeks, and a sum of two hundred guilders must be paid into court, as a fine (3). The writ of *revisie* must be applied for and served within such time that it may be made returnable within one year after the delivery of the judgment if the applicant is in *Europe*, and within two years if he resides in any other part of the

(1) *Judic. Pract.* 2 B. 29 H. § 1.

(2) *Reglement op de Revisiën van Sententiën van den Hove van Holland en Zeeland*, van 1 Feb., 1796, Art. 2.

(3) *Regl. Art.* 3.

world (1). If a *revisie* is noted of a judgment, the execution of which would be irremediable upon the final decision of the case, the opposite party may apply to the High Court for an order that the *revisie* should be prosecuted within a short time (2).

The pleadings in *revisie* are short, and confined to the documents in the case when last heard (3). The number of *reviseurs* added to the High Court are *six* in civil, and *eight* in criminal cases; they are nominated by the Departmental Administration within a month after the pleadings are closed (4). Within two months after this nomination, the applicant applies for a day for argument in cases which are pleaded orally, and in cases which are pleaded in writing, the memorials (*deductionen*) are put in (5).

The case is decided in *revisie* upon the documents in the case when last heard, and after this decision no further proceedings are allowed (6).

(1) *Reglement op de Revisiën van Sententiën van Feb. 1, 1796, Art. 4.*

(2) *Ibid. Art. 5.*

(3) *Ibid. Art. 6.*

(4) *Ibid. Arts. 7, 8, 9.*

(5) *Ibid. Art. 10.*

(6) *Resol. Holl. 25 Jan., 1659; G. P. B. 7 D. fol. 938; Regl. Arts. 12, 14.*

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## CHAPTER VII.

ON BENEFIT OF INVENTORY, CESSIO BONORUM; ATTERMINATIE, OR GRANTING TIME TO EM-BARRASSED DEBTOR UNDER SECURITY; INDUCTIE, OR ORDER TO SHOW CAUSE AGAINST DELAY IN PAYMENT; RESTITUTIO IN INTEGRUM.

### SECTION I.

BESIDES the legal remedies already discussed there are also some which, although granted by the High Court of Holland, are inquired into by the judge of the domicile, upon proper pleadings, and confirmed (*geïnterineerd*), or rejected. This order from the High Court to the lower court is called a *committimus*. This chapter is set apart for the explanation of these legal remedies.

Benefit of inventory.

I. *Benefit of inventory* (1). In order to obtain the benefit of inventory, a petition is presented to the High Court, in which the applicant sets forth his fears that the estate is encumbered with debts, and that consequently the adiation thereof would be prejudicial, and further prays for *letters of benefit of inventory*, with *committimus* to the court of the town where the deceased died, or to the court of the nearest town if the death took place in the country (2). By virtue of these letters, the process-server must give notice to the creditors and legatees of a day upon which they

(1) Compare with this what we have already said about this legal remedy at pp. 74-77.

(2) *Ampl. Instr. van 't Hof*, Art. 5; Van Alphen, *Papeg*. 1 D. pp. 214, 221.



are to appear: *a*, at the house where the deceased died, to witness the drawing up of the inventory of the property there situate; *b*, before the court to which the *committimus* is addressed, to be present at the confirmation of the above-mentioned letters.

The inventory is drawn up by the process-server, in the presence of schepenen, and within forty days after the issuing of the letters (1).

The applicant must have the property valued, after it has been inventoried, and must give security for this amount. Next he must liquidate the estate, and render an account thereof. When the day appointed for the hearing has arrived, the applicant files a claim for the confirmation of the letters of benefit of inventory, according to their form and tenor. The creditors who wish to oppose plead to it, concluding with a prayer that the claim may be dismissed with costs. In this proceeding *one* default is decisive, the effect of which is that the letters are confirmed (2).

## SECTION II.

Benefit of  
cession. (*Cessio  
bonorum*.)

II. *Benefit of cession*, or *cessio bonorum*. For this purpose an application is made by way of petition to the High Court, as successor in this respect to the late Supreme Court (3), in which is inserted the names and residences of the principal debtors (4). The High Court sends this petition by letters missive to the municipality of the petitioner's residence in order to

(1) *Placaat van Keiser Karel van 19 Meij*, 1544, *Art.* 39.

(2) *Jud. Pract.* 2 B. 30 H. § 4.

(3) *Reglem.* 18 Sept., 1595, *Art.* 2.

(4) *Ordonn. H. R.* 24 Junij, 1649; *G. P. B.* 7 D. p. 936.

obtain their opinion upon it (1). This opinion however is not required if the petitioner lives in the country (2). The opinion being sent in, and no special cause being shown to the contrary, the High Court grants *letters of cession*, with a *committimus*, to the court of the petitioner's present residence, or of the place where he last resided during the year (3).

When the letters of cession have been granted and served, the consequence thereof is that the person of the cedent may not be taken in arrest (4); but a curator is immediately appointed to look after his estate. Upon the day appointed for the hearing the cedent must appear in person to hand in the schedule and inventory of his estate drawn up by him, and to be present at the inquiry as to the confirmation (*interinement*) of the letters of cession obtained by him (5). The creditors summoned have the right first of all to demand copies of the letters of cession and of the inventory, a statement of the cedent's misfortunes, and inspection of all papers belonging to the estate (6). If they consider that there are grounds for opposing, by reason of fraudulent dealings on the part of the cedent, they conclude their pleas by praying that the claim for confirmation may be dismissed, and they also pray that a provisional order may be made that the cedent be placed in close confinement. Upon this issue is joined and judgment is delivered by the court.

(1) *Resol. Holl. 2 Meij*, 1595.

(2) *Judic. Pract. 2 B. 31 H. § 2*, p. 396.

(3) *Resol. Holl. 14 Sept.*, 1736; *G. P. B. 6 D. p. 652*.

(4) See my *Verzameling van merkwaardige Gewijsden*, 1 D. C. 30, p. 322.

(5) *Judic. Pract. 2 B. 31 H. § 5*.

(6) *Ibid. d. l. p. 400*.

In the case of *cessio bonorum* one default is decisive, the effect of which is that the letters are confirmed.

## SECTION III.

*Atterminatie.*  
(Granting time  
to embarrassed  
debtor under  
security.)

III. *Atterminatie*, or *respijt*. This benefit consists in the granting of a delay of payment for the period of five years or less, provided proper security is given for payment after the lapse of that time (1). For this purpose a petition is presented to the High Court—which has succeeded to the late Supreme Court in this respect (2)—setting forth that the condition of the petitioner's estate is such that, although he is actually able to make payment, he requires some postponement of payment, and that moreover he is able to give security to his creditors by proper sureties; upon which grounds he then prays for *letters of atterminatie*, with a *committimus* to the court of his residence (3). These letters being granted, and notice thereof served upon the creditors, upon the return day a claim is filed in the lower court for confirmation, and at the same time the surety bond is also filed. The creditors may oppose this confirmation, either by reason of the insufficiency of the security tendered, or on account of fraudulent conduct on the part of the debtor, which renders him unworthy of this indulgence. Upon this the pleadings are brought to an issue, and a judicial decision is given (4).

(1) Voet, *Ad tit. ff. de cess. bon. n.* 14, *seqq.*

(2) *Reglem. van 18 Sept.*, 1795, *Art.* 3.

(3) *Judic. Pract.* 2 B. 32 H. § 2.

(4) *Ibid.* § 3.

#### SECTION IV.

IV. *Inductie*. This consists in an order of the High Court (1), made upon a petition presented for that purpose, by which the process-server is authorised to summon the creditors before the court of the debtor's residence, to show cause against a postponement of payment, with an order upon the said court to decide thereon, according to law and reason. The writ being granted and served, the applicant files his application at the Rolls of the said court, and prays, upon a tender of such security as he can offer to his creditors, that the court may be pleased to hear such creditors as may appear, or their attorneys, upon the *inductie*, and, if possible, to induce them to consent to the indulgence prayed for, or, if they will not listen to reason, to be pleased to make such order *ex officio* as shall seem just and meet. The creditors thereupon show cause, and those who wish to resist the application oppose upon pleadings, upon which the judgment of the court is delivered (2).

*Inductie*.  
(Order for creditors to show cause why time for payment should not be granted.)

#### SECTION V.

V. *Relief, restitutio in integrum*, by reason of a person having been induced by fear, fraud, minority, mistake, or other equitable reasons, to do the act against which he wishes to have restitution (3). The granting of writs of relief formerly belonged to the Supreme Court, but now, since the abolition of that collegium,

Relief. (*Restitutio in integrum*.)

(1) *Ampl. Instr. Art. 7.*

(2) *Judic. Pract. 2 B. 33 H. §§ 3, 4.*

(3) *Vide supra, p. 172.*



it appertains to the High Court (1). The *writs of relief*, which may indeed be granted by way of provisional judgment, but which must always be inquired into and confirmed by the court to whose jurisdiction the case belongs, or before which it is pending (2), are of two kinds: they either affect the case itself (*substantial*), or they are granted against some omission in the proceedings (*judicial*). They are granted either by way of a *writ*, if the whole case has still to be instituted, or by *letters of requeste civil*, if the case is already pending. To illustrate this more clearly by an example: suppose A considers that, owing to B's fraud, he has been misled in some transaction, and that therefore he can demand that that which B has received from him on this account should be given up. In that case he applies to the High Court for a *writ in an ordinary action in the first instance*, in order to obtain this re-delivery, containing a *clause of relief* against such acts and conduct on his part as might, in strict law, be a bar to this action; and for a *committimus* to the court of B's domicile to confirm the writ of relief after inquiry. But suppose that B has already brought an action against A for the fulfilment of this fraudulent contract, and A, in order to defend himself, wishes to be relieved against the making of this contract, then he must not apply for a writ, because a lawsuit is already pending; but he only prays for *letters of requeste civil* and for a *committimus* to the court in which that suit is pending (3).

(1) *Judic. Pract.* 4 B. 1 H. § 1; *Reglem. van* 18 Sept., 1795, Art. 3.

(2) *Verdrag van* 3 Aug., 1587, Art. 11.

(3) *Judic. Pract.* 4 B. 1 H. § 4.

The writs of relief against omissions in judicial proceedings are of numerous kinds. Besides the *writs of relief* for relief when an appeal is not noted or prosecuted within the proper time, and for which purpose a special clause is inserted in writs of *appel* (1), there are the writs of relief—

1st. Against defaults.

2nd. Against bars of plea.

3rd. For amending one's declaration and prayer.

4th. For adding thereto.

5th. For producing evidence after the time for doing so has elapsed.

6th. For amplifying and augmenting evidence already put in.

7th. For introducing new facts into a suit and proving them (2).

Both in case of *writs of relief* and *requestes civiel*, when they have been referred to the lower court for inquiry, the claim must be filed in the court to whom the *committimus* is addressed, "for *interinement* or confirmation of the said writ of *relief*, according to its form and tenor, and that consequently the applicant may be relieved and granted *restitutio in integrum*, in accordance with the letters" (3). The defendant who wishes to oppose the claim for relief concludes his plea by praying that the relief may not be granted, and that the claim of the applicant for confirmation may be refused.

(1) Vide *supra*, p. 318.

(2) *Judic. Pract.* 4 B. 1 H. § 8.

(3) *Ibid.* §§ 9, 10.

## CHAPTER VIII.

ON THE MANNER IN WHICH CASES, AFTER ISSUE HAS BEEN JOINED, ARE MADE RIPE FOR JUDGMENT.

### SECTION I.

Pleadings in cases on the roll.

THERE is a certain class of cases which, after issue has been joined, require nothing further to be done than that they should be orally pleaded. This is the case with all provisional cases, exceptions and incidental proceedings; and also with those cases which are summarily disposed of (1).

In the lower courts the arguments generally take place before the full collegium; in some places before less than the full number of *schepenen* (2), and in the High Court before Commissioners of the Rolls (3).

### SECTION II.

Cases tried orally or upon documents.

All other cases, after interchange by the parties of inventory and documents, are pleaded verbally or in writing. In the lower courts the arguments are nearly all oral, and written arguments are little known, except in cases which in their nature are not adapted for oral arguments.

The following rules are observed in the High Court with respect to verbal or written arguments:—

(1) *Vide supra*, 3 *C.* p. 282, *et seqq.*

(2) *Ordonn. op't Proced. te Amsterdam van 28 Jan., 1799, C. 6, § 11, en volg.; Keuren. van Leyden, No. 183, p. 269.*

(3) *Judic. Pract.* 2 *B.* 5 *H.* § 4, and 3 *B.* 1 *H.* §§ 1, 2.

1st. All questions of mere law, and in which the evidence of witnesses is unnecessary, in cases involving a thousand guilders and upwards, are argued orally in court (1).

2nd. All questions of fact, in which the evidence of witnesses is necessary, in cases involving a thousand guilders and upwards, must be argued in writing (2).

3rd. All cases involving less than a thousand guilders are always argued before two Commissioners (3).

4th. All ordinary criminal cases are conducted in the same way as cases which must be argued in writing, though they are nevertheless afterwards argued orally in court (4).

The High Court, immediately after issue has been joined, decides between the parties, by noting a minute upon the rolls, whether the case shall be argued orally or in writing. This is called an order *dispositief* (5).

### SECTION III.

Before argument, whether verbal or in writing, the parties have to deliver to each other copies of inventory and documents. In order to compel one another to do this, three orders are necessary in the High Court (6). The usual practice in the lower courts is for the party who has filed his inventory to apply that the other party may be barred from producing documents.

Interchange by parties of inventory and documents.

(1) *Nad. Ampl. Instr. van 24 Maart, 1644, Art. 27.*

(2) *d. Art. 27; Merula, Man. van Proced. Lib. 4, Tit. 42, C. 4, in not.*

(3) *Reglem. 9 Maart, 1728, Art. 7.*

(4) *d. Reglem. Art. 1.*

(5) *Judic. Pract. 3 B. 1 H. § 6.*

(6) *Merula, Man. van Proced. L. 4, Tit. 42, C. 4, in not.*



The *inventory*, or list of documents in the case, is not everywhere of the same form (1), and certainly one must confess that nowhere is it drawn up more neatly than in the High Court. After the inventory itself and the power of attorney, granted to the attorney, have been filed, the pleadings are put in, both of the first and second instance, each separately marked with letters in alphabetical order, with a short statement of the course of the proceedings. Thereupon follow the documents in proof of the facts, in the same order in which they are stated in the writ or in the plea, with an index to each document showing which clause it is in proof of (2). In cases argued orally, a document is also annexed at the end of the inventory, termed *casus-positie*, containing a history of the whole case and of the pleadings, and finally a statement of the question at issue arising upon the pleadings (3).

## SECTION IV.

Examination of  
witnesses in  
the lower  
courts.

If the declarations of witnesses are filed with the inventory, then the next step in cases pending before a lower court is to hear the witnesses. As in law no witness can be listened to unless he is sworn, and an opportunity is afforded to the opposite side of cross-examining him—which is called in practice *een getui-*

(1) Practitioners might very well pay a little more attention to this. The Amsterdam *Notitien van Stukken* (lists of documents), in particular, are sometimes very slovenly. Besides an inventory, in neat order and framed with careful attention, is a sort of abstract to the judge, enabling him to obtain a clear idea of the case.

(2) *Judic. Pract.* 3 B. 2 H. §§ 7-9.

(3) *Ibid.* § 5.

*genis in forma probanti beleggen* (1)—the witnesses must appear personally before the court, to confirm their declarations by oath, and at the same time to answer the questions in cross-examination which may be put to them by the judge in the name of the opposite party. With respect to the framing of these cross-questions, it must be specially borne in mind that they must be confined to matters contained in the declarations, and that witnesses must not be examined as to matters not referred to in their declarations; and also that all irrelevant questions should carefully be avoided, and above all catch-questions, which the judge is bound, if they strike him, to disallow (2). All this, besides the additional documents which it may be deemed necessary to make use of, is annexed to the proceedings by a subsequent or *amplified* (*ampliatie*) *inventory*. After all evidence has been produced, the proceedings are closed—which is called *renouncing further production (of evidence)*, and a day for argument is applied for. In the High Court witnesses are never heard in cases argued orally; this only happens in cases which are conducted in writing; we will speedily and shortly state the manner in which this is done (3).

## SECTION V.

When the proceedings are closed, the case is argued. By *argument* is meant “the oral advancement before the court of the grounds and reasons in support of that which is contended for in the action, and the refutation

Rules of  
pleading.

(1) Voet, *ad tit. ff. de testib. n. 15.*

(2) *Judic. Pract.* 3 B. 4 H. § 12.

(3) *Ordonn. op 't Proced. in de Steden en ten platten Lande.* Arts. 14–28, *en aldaar*; S. van Leeuwen, *in not.*

of the objections taken by the opposite side." There are four stages in the arguments, just as in the pleadings, viz.: the *claim*, the *answer*, the *reply*, and the *rejoinder*. To deliver an able argument is a matter of practice, which becomes more and more polished with time. However, the following rules upon this subject ought chiefly to be borne in mind (1).

1st. The pleader must consider the case from all sides and thoroughly master it. Read the documents over and over again; work the case up to the true legal point; apply legal principles properly to that point; further, look up what the principal jurists have written upon the subject or what other judges have decided in similar cases. *Voilà* the proper preparations of a true advocate (2).

2nd. All this is set out on a *pleit-memoirie*,\* which at first it is best to write out *in extenso*, gradually accustoming oneself to abbreviate it until at last one learns to argue from short notes. The style ought to be clear, agreeable and dignified (3), and one must never lose sight of the fact that the object of all pleading must be to *convince* the court that one is right (4).

(1) The little book of Gui upon this subject, *De l'Eloquence du Barreau* (Paris, 1767, in 8vo), deserves great praise. The reading of the orations of *Demosthenes* and *Cicero* certainly assists one in delivering an argument. But as the form of their orations and our arguments differ in important aspects, we should not fail to read the works of *D'Aguesseau* (Paris, 1759, 8 vols. 4to) and of *Cochin* (Paris, 1771, 6 vols. 4to), and above all the printed *Memoriën en Deductiën*, which we recommend, from experience, for the formation of a good style.

(2) *Judic. Pract.* 3 B. 2 H. § 13.

\* A sketch of the argument.—Tr.

(3) *Judic. Pract.* 3 B. 2 H. § 14.

(4) *Ibid.* § 18.



3rd. The best order and division is always that which, by its clear and agreeable manner, is most calculated to enable the court to grasp the case. Very often the order of the pleadings suggest the best division (1).

4th. The chief fault which a pleader has to avoid is *tediousness*. It deadens the attention, bores the court, and finally the point of the argument is lost. However, he should avoid the opposite extreme, of becoming superficial, by not saying all that is necessary. To steer a middle course between these two rocks is the safest (2).

5th. The arguments should be advanced with natural and unaffected eloquence, and above all with due *respect* to the court, and the opposite side. The use of insulting expressions is a disgrace to the court. However this *respect*, which is so essential, does not exclude boldness, and does not prevent the pleader, when necessary, from calling things by their proper names (3).

## SECTION VI.

There is hardly any difference in the lower courts in the conduct of cases argued verbally or in writing. But in the High Court the cases argued in writing have an entirely special form, upon which it will be sufficient here to make the following short observations (4). It is commenced by deciding that the case shall be argued in writing, by noting a minute on the

Cases tried  
upon docu-  
ments.

(1) *Judic. Pract.* 3 B. 2 H. § 15.

(2) *Ibid.* § 16.

(3) *Ibid.* § 17.

(4) *Ibid.* 3 B. 3 and 4 H.



rolls. This is called an *order dispositief*, to draw up the instrument to file it, and produce evidence if necessary. The inventory, including all the documents, is drawn up in due form, and filed at the *Furneer Rolls* of the High Court. Four weeks must be allowed to elapse before the opposite party can be compelled to do the same; first, by serving a notice (*insinuatie*) upon him, and next, by an *order of court* commanding him to do so (1).

When the documents on both sides are filed, the parties deliver to each other copies of the inventory and documents, and deliver to the court their private written statement of *advertissement van rechten*, which is really nothing else than a written argument expressed in a fluent style, with the reasons set out in a connected manner, and in which the several points are treated in due order, in paragraphs. The same rules which the advocate has to observe in court are also applicable to this case.

*Verbaal van  
informatiën.*

This is all that is done if no witnesses are to be called; but if they are, and the opposite party does not think proper to declare that he will consider the witnesses as called,\* they must appear in person before the commissioners, and be examined there: a *verbaal van informatiën* † is drawn up of all these matters (2). The first is to apply to the *Furneer Rolls*, for the fixing of a day to produce evidence. Two petitions are

(1) *Judic. Pract.* 3 B. 3 H. § 4.

\* See Section IV.

† That is, a record containing the commission by which the commissioners are appointed, the writ summoning witnesses, the notes thereof and their respective returns, the depositions of the witnesses, and subjoined to each deposition, the cross-questions and answers (*Jud. Pract.* 2 B. p. 62).—Tr.

(2) *Jud. Pract.* 3 B. 4 H. § 9.

presented: the one for a *writ to summon witnesses*, by virtue of which the witnesses are summoned before the court; and the other for the *appointment of commissioners* to take the evidence (1). Next, notice is served upon the attorney of the opposite side, of the day appointed for hearing; and at the same time copies of the declarations of the witnesses are delivered (2).

Upon the day appointed the witnesses are examined before the commissioners, both upon their declarations and upon such questions, in cross-examination, as the opposite party may think proper to put. The evidence given is kept secret from the parties\* until they state that they renounce all further production of evidence, and apply that the record of the evidence may be thrown open (3). Finally, the case is completed by noting the usual minutes at the *Furneer Rolls* (4).

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## CHAPTER IX.

### ON JUDGMENTS AND THEIR EXECUTION.

#### SECTION I.

WHEN the case has been made ripe for judgment by the parties, it must be decided by the court by judgment. In the High Court the documents on both sides are referred by the President to one of the

Referee to  
report on the  
judgment.

(1) *Judic. Pract.* 3 B. 4 H. § 10.

(2) *Ibid.* § 11.

\* The witnesses are examined one by one with closed doors, none of the parties being allowed to be present.—Tr.

(3) *Judic. Pract.* 3 B. 4 H. § 14.

(4) *Ibid.* § 15.

members of the court for examination and report thereon, who is called referee (*rappporteur*). He must not be a person related to any of the practitioners engaged in the case (1). His duty is to observe the strictest secrecy, to read the documents and *advertissemerten* (vide supra, p. 326) and to make short notes thereof, which are called a *recueil* (2). When the referee has made his report, the documents themselves are read in the court, votes are taken with regard to the case, and judgment is delivered according to the majority of votes, to which must be subscribed the names of all the members of the court who have deliberated upon it (3).

In the lower courts it is not usual to appoint a referee; the documents are sent round to each of the schepenen for two or three days or more, for his perusal; after it has been sent all round, each gives his vote, and the majority decides the judgment, which must be signed by all the members.

## SECTION II.

Further evidence called for by referee.

It sometimes happens that the judge, in investigating the case, finds that some point upon which the judgment depends is either not proved at all or insufficiently proved. In such a case the judge orders the party whom, according to the nature of the case, it concerns, to adduce such evidence within a certain time. This is termed *opening—pointen van officie* (4).

(1) *Resol. Holl.* 23 Maart, 1669, *G. P. B.* 3 D. p. 663.

(2) *Instr. Hof, Arts.* 149, 150.

(3) *Ibid. Art.* 34; *Decis. en Resol. van 't Hof*, No. 121.

(4) *Judic. Pract.* 3 B. 5 H. § 4.

### SECTION III.

We have still to observe with respect to definitive judgments that—

Requisites of judgments.

1st. They must contain an entire or partial admission or dismissal of the claim, and they may not contain the expression that the claim, as made and framed, is dismissed (1).

2nd. That justice must be done thereby in the name of "*the Batavian people*" (2), which clause has taken the place of the former one, *in the name and on behalf of the Sovereign and County of Holland, Zeeland, and Friesland* (3).

3rd. That they must contain some order as to the costs, either by condemning one of the parties to pay the same, or by making each party pay his own. The latter takes place either because the parties are very nearly related to each other; or because the respondent in appeal had a judgment in his favour, or because the case appeared so doubtful to the judge that, according to his view, the plaintiff did not act rashly in instituting the action, nor the defendant in opposing it; with the determination of which the judge's conscience is burdened (4).

4th. That a sufficient number of the members have deliberated upon the judgment. In the lower courts the judgments are delivered by all the schepenen, in so far as they are not prevented from doing so by

(1) *Ordonn. op 't Proced. in de Steden en ten platten Lande*, Art. 19; *Ampl. Instr. van 't Hof*, Art. 26.

(2) *Staatsreg. van 1805*, Art. 73.

(3) *Judic. Pract.* 3 B. 5 H. § 6.

(4) *Instr. H. R. Art.* 49; Voet, *ad tit. ff. de re judic.* n. 22.



sickness or necessity. In the High Court *five* members of the court are necessary to decide a civil case; and in criminal cases the High Court ought to consist of as many members as possible (1).

#### SECTION IV.

Delivery of  
judgment.

In order to render a judgment of a court valid it is necessary that it should be pronounced or delivered publicly. This is done at the Rolls by the Registrar or secretary. In the lower courts it is not usual to charge the parties any fees for the members except in the country, where the fees of counsel, not connected with the case, who have been consulted by the *schenen* upon the judgment to be delivered, are charged. But in the High Court the parties are charged with the *rapport* fees, which are recovered by summary execution, and before the payment of which no copy of the judgment delivered is issued (2). After the judge has once delivered his judgment, he may not alter it in any way, but he may explain his meaning by way of *interpretation* (3).

#### SECTION V.

Execution and  
order for  
execution.

As soon as a judgment has obtained the force of law—either because no appeal lies, because no appeal has been noted within the ten days, or because the time for prosecuting the appeal has elapsed—*execution* may be taken out, unless, owing to the superannuation of the judgment, or the death or change of status of the

(1) *Judic. Pract.* 3 B. 5 H. § 7.

(2) *Resol. van 't Hof, van 11 Feb., 1772, G. P. B. 9 D. fol. 638.*

(3) *Judic. Pract.* 3 B. 5 H. § 7.

party against whom judgment is given, the judgment has first to be declared executable (1). In the lower courts nothing else is necessary than to place the judgment in the hands of the messenger, but in the High Court one must first take out a *writ of execution* of the judgment in the registrar's office: i.e., an authority to the process-server to execute the judgment according to its form and tenor (2).

## SECTION VI.

The first step in every execution is the *sommative*, *Sommative and renovatie (writ of execution and alias writ).* which consists of a document to be delivered by the process-server or messenger to the execution debtor, by which he is called upon to satisfy the judgment within *twenty-four* hours, and to pay the costs, on pain of further execution. In the High Court the *sommative* sets out, in accordance with the letter of the judgment what is required of the execution debtor, and a copy of the judgment and of the writ of execution is delivered to him (3). This course is quite just and proper; it is adopted in many of the lower courts, although it is not observed in some places: e.g., at Amsterdam and in North Holland.

The twenty-four hours having elapsed, and the judgment not being satisfied, the *sommative* is again repeated, which is called *renovatie* (or *alias writ*) (4).

(1) Vide *supra*, p. 284.

(2) *Judic. Pract.* 3 B. 6 H. § 2.

(3) *Ibid.* § 6.

(4) *Ibid.* § 10.

## SECTION VII.

Different kinds  
of execution.

If these two acts of execution have been completed without a satisfaction, the execution is further proceeded with, but in a very different manner, according as the judgment was delivered in a *real action* by which any immovable property was adjudged; or, in a personal action for the payment of a sum of money; or, if the judgment was for the performance of an act, or if a person has judgment given against him in *some particular capacity* (1).

## SECTION VIII.

In real actions.

I. In *real actions*, in which a person is condemned to give up and keep out of the possession of some immovable property (because this course is not applicable to movable property, in which case the mode of proceeding is by *gyzeling* [civil imprisonment]), the execution is levied in the following manner: the process-server or messenger, with proper assistance, immediately ousts the judgment debtor from possession, and places the judgment creditor in possession (2).

## SECTION IX.

In personal  
actions.

II. In *personal actions*, in which a person is condemned to pay a sum of money, the process-server or

(1) *Judic. Pract.* 3 B. 6 H. § 3.

(2) *Ordonn. op 't Proced. in de Steden en ten platten Lande*, Arts. 29, 30; *Reglem. voor. de Deurwaarders van den Hove van 28 Maart, 1680*, Art. 12; *Ordonn. op de Man. van Proc. te Haarlem. van 11 Sept., 1751*, C. 14, Arts. 14-16.

messenger, upon serving the *renovatie*, demands that property should be pointed out. Indeed, the judgment debtor may always declare upon which goods he wishes the execution to be levied, if he has no ready money (1). Independent of such property being pointed out, the process-server or messenger is bound in the first place to levy upon the movable or personal property, taking as much thereof as may be necessary to satisfy the execution (2). The process-server or messenger takes the good pointed out, or other goods, in *arrest* or custody, in the presence of two *schepenen*; he draws up an inventory of them, and keeps them in his custody for six days (3). During this period he gives notice on a Sunday and a market-day of the public sale of these goods (4); and if the execution debtor does not find means to satisfy the execution within the six days, he immediately proceeds with the sale. He may not of his own accord postpone the day fixed for the sale, without the written request and consent of the execution debtor, which is called *acte van non interruptie* (5). In the towns the sale must take place upon a market day, and in the villages upon a court day; the sale to be to the highest bidder, and for ready money. After the sale has taken place and the proceeds have been received, the process-server deducts the cost of the execution from that amount; he then pays the plaintiff what was granted him by the judgment, and renders

(1) *Ordonn. op 't Proced. in de Steden, etc. Art. 24.*

(2) *Ordonn. Art. 24; Reglem. voor de Deurwaarders van 1680, Arts. 14-16.*

(3) *Ibid.*

(4) *Ibid. Arts. 16, 17.*

(5) *Judic. Pract. 3 B. 6 H. §§ 16, 17.*



an account of the surplus, if any, to the execution debtor (1).

## SECTION X.

Execution  
opposed.

If the judgment debtor, or even a third party, considers that he has any grounds for opposing the execution, the judgment debtor must do so, in the High Court, by applying for an *interdict* (2); third parties, who claim to have a right of ownership or other real right in the goods taken in execution, proceed in the High Court by way of *opposition*, giving notice thereof to the process-server, who accepts their notice of *opposition*, and gives them notice of a day for hearing (3). In the lower courts execution is always resisted by way of *opposition*; but, if the judgment debtor opposes, not until he has obtained an order of court for this purpose. In *Amsterdam* this is called an *order of audiatur in case of opposition of execution*. The mode of procedure in case of *opposition* is simple, and similar to that in summary cases, which have already been discussed (4). The party resisting execution files his claim at the Rolls praying that it may be declared that his opposition is valid, and that the execution may be removed free of all costs and damages, and that all costs, damages and interest incurred may be repaid him. The party who is opposed puts in his plea that the prayer of the person opposing may be rejected, and that he may be allowed to proceed with the execution. When the case is

(1) *Ordonn. & Reglem. d. d. Art.*

(2) *Reglem. voor de Deurw. Art. 18.*

(3) *Reglem. d. Art. 18.*

(4) Vide Chapter III. of this Book.

brought to an issue it is argued at the Rolls. One default is a bar, the effect of which is that the proceedings in *opposition* are set aside (1).

## SECTION XI.

If the judgment debtor does not possess any movable property sufficient to satisfy the execution, the process-server or messenger proceeds to levy upon the immovable property (2). After he has made the most diligent inquiries whether the judgment debtor possesses movable property; he attaches the immovable property: but he must not levy execution upon property of great value for small debts unless it cannot be divided (3), and first he must take the judgment debtor's own property; then property subject to a *census*\* and quit-rent property, the outstanding claims, the fruits arising from feuds, and lastly the feuds themselves (4). In the lower courts, after the property has been attached, the sale thereof is published and made known by announcing it upon four Sundays and market-days in the towns, and upon four Sundays and court days in the country, and also by placards which are posted up in the nearest town. After the sale has taken place and the purchase money has been paid, *letters of decreet* or a deed of transfer are granted to

Execution upon  
immovable  
property.

(1) *Judic. Pract.* 3 B. 6 H. § 21.

(2) *Ordonn. op 't Proced. etc. Art. 25*; *Reglem. voor de Deurw. Art. 21.*

(3) *Reglem. Art. 22.*

\* See p. 91, note.—TR.

(4) *Ordonn. op 't Proced. etc. Art. 25*; *Reglem. voor de Deurw. Art. 24.*

the purchaser by the lower court (1). Only one announcement upon a Sunday and market day or court day is required in case of the sale of claims or debts due (2).

## SECTION XII.

In the High  
Court.

In the High Court the execution upon immovable property is accompanied by very many forms and ceremonies. When the attachment has been made in the presence of schepenen, notice thereof is given both to the execution debtor and the lower court. Then the process-server issues proclamations on four Sundays and market days. When the day fixed for the sale has arrived, he lights a wax candle, puts the property up for sale under certain conditions of sale which are read out in public, and knocks it down to a person who is the highest bidder at the time the wax candle is burnt out (3).

This sale, however, is merely provisional; the actual or final sale takes place at the Rolls of the court. In view of this the process-server summons all the persons who can be considered to have any interest whatever in the sale "*to be present at the decree of transfer by the Court:*" i.e., to be present when the sale which has taken place is confirmed by the High Court, and when perpetual silence is imposed upon all persons who might have opposed it, or who wished to oppose it (4). The process-server makes a *return* of all these

(1) *Ordonn. op 't Proced. etc. Art. 25.*

(2) *Ibid. Art. 26.*

(3) *Reglem. voor de Deurw. Arts. 24-33; Judic. Pract. 3 B. 6 H. §§ 23-29.*

(4) *Judic. Pract. 3 B. 6 H. §§ 30-35.*

matters, and annexes it to the judgment and writ of execution (1). Upon the day fixed for appearance, the execution creditor files his claim at the Rolls of the High Court for the passing of the decree of transfer. Every person who wishes to oppose this claim must enter an appearance, assign his reasons for opposing, and plead to the said claim, upon which issue is joined, after which the documents on both sides, drawn up in an inventory, are handed in to the High Court. These oppositions, however, are rare, and as a rule the parties summoned consent to the decree being passed, saving to them their right of preference (2).

When the decree has been passed by the High Court, a certificate thereof is drawn up in the registrar's office, which is called a *deed of proclamation*: i.e., an invitation to one and all to appear at the High Court upon a certain day and make a higher bid than the price already bid. This deed is published by the process-server, and placards announcing the ensuing final sale are posted up (3). When this said day has arrived, the property is *de novo* publicly put up for sale at the Rolls of the High Court by the assistant registrar or secretary in charge of the Rolls, and knocked down to the highest bidder. This proceeding is called "*sale by removing the seals from the wax and the letters of decree*" (deed of transfer), because the following ceremony then takes place: viz., the oldest Commissioner (of the Rolls) holds the *deed of transfer* in his hand, with the court's seal attached thereto, as long as there are any bids for the property ;

(1) *Jud. Pract.* 3 B. 6 H. § 36.

(2) *Ibid.* § 37.

(3) *Ibid.* §§ 38, 39.



and when no one will make a further bid he removes the seal, as a token of adjudication of the property to the purchaser (1).

## SECTION XIII.

Order of  
ranking.

The money arising from the sale of immovable property taken in execution must be paid into court to the secretary of the lower court or the registrar of the High Court; and afterwards the order of ranking which is to be observed in the distribution of these proceeds is settled by a *verbaal*.

If the parties are not agreed upon this, each files a preferent claim, and the dispute is decided by the judge. When the ranking has been settled, every person may take out the sum adjudged to him, upon giving security for repayment if at any time any person should appear who has a better claim to it (2).

## SECTION XIV.

Attachment  
of judgment  
debtor.

If the party against whom judgment was given possesses no property whatever, or no sufficient property by which the tenor of the judgment can be satisfied by execution, the judgment creditor may proceed against his person, and have him lodged in prison. In the High Court the process-server does this by virtue of the writ of execution, without the necessity of any special authority to do so. He takes the judgment debtor to the front door of the High Court, where the gaoler is bound to receive him, and lodge him in the

(1) *Jud. Pract.* 3 B. 6 H. § 40.

(2) *Ibid.* §§ 41, 42.

*gyzel* chamber (prison chamber) (1). In the lower courts, if the parties against whom a judgment has been given possess no property, their persons may, according to the common law (2), be attached by the messenger; but in some of the lower courts an order of court to this effect must be applied for and granted (3).

### SECTION XV.

III. In actions in which a person is condemned *to perform some act*: e.g., to render an account—and on the same footing are judgments against any collegiæ, tutors, curators, receivers, agents, or others condemned in some particular capacity (4)—execution is levied by way of *gyzeling* (civil imprisonment). Execution in actions for performance.

In the lower courts and in the country, the party against whom judgment has been given, after a writ of execution and alias writ have been issued, is served with a notice of the place where he is to be imprisoned, which is either some prison ward suited for that purpose or some inn. If he does not appear at such place, he is apprehended and lodged in gaol until he satisfies the judgment. But if he appears every day at the place appointed for his confinement, and continues to do so for fourteen days, without satisfying the judgment, he is kept in civil imprisonment, to remain Civil imprisonment in the lower courts.

(1) *Jud. Pract.* 3 B. 6 H. § 43.

(2) *Ordonn. op 't Proceed. etc. Art.* 28.

(3) For example, at Amsterdam, where the execution-debtor must first be summoned and heard before the application for re-attachment of his person is made.

(4) Van Alphen, *Papeg.* 1 D. 31 H. p. 487; *Reglem. voor de Deurw. Art.* 36.

there in the manner aforesaid (1). If he has been in prison for a month, and has not yet satisfied the judgment, the execution creditor may apply to have the act \* valued and converted into a sum of money, until payment of which the party against whom judgment was given must remain in civil imprisonment (2). The party imprisoned is bound to make his tender, as to the mode of satisfying the judgment, whilst in prison: and if the judgment creditor is not satisfied with it, the party imprisoned must proceed by way of *opposition to the execution*, and in this proceeding have the sufficiency or insufficiency of his tender inquired into and decided (3).

## SECTION XVI.

In the High Court.

In the High Court of Justice the mode of proceeding in *gyzeling* is very regular, and is shortly as follows: The process-server serves a notice upon the execution debtor, fourteen days after the alias writ, to appear to place himself in confinement on Sunday the — in the evening before sunset, at the gaol in the Hague, and there to remain in civil imprisonment until he has satisfied and performed the act for (the non-performance of) which he is imprisoned (4). Before

(1) *Ordonn. op't Proced. etc. Art. 31.*

\* Performance of which was decreed by the judgment.—Tr.

(2) *Ibid. Art. 32.*

(3) By the *Ordonn. op. de Manier. van Proced. te Haarlem van 1751, Cap. 14, Arts. 17–31*, a regular mode of procedure in case of civil imprisonment has been adopted, more or less in imitation of the practice in the High Court, the more general adoption of which is desirable, as the remedy of *opposition* is, for more than one reason, quite unsuited for this case.

(4) *Jud. Pract. 3 B. 7 H. § 2.*

the day is fixed for civil imprisonment, the applicant must arrange about the expenses, and give security for them. When the day has arrived, the debtor is visited in his imprisonment in the evening at sunset, and also the following morning before the opening of the court, to see if he is there (1). If the debtor is not in the prison, the High Court grants default against him, and as a consequence thereof orders that he be apprehended (2). If he does appear in the prison, but does not satisfy the judgment, the attachment of his person is ordered after the lapse of fourteen days; and after the expiration of a month the act \* may be assessed (3). In order to settle the manner in which the judgment is to be satisfied, the imprisoned debtor applies to the commissioners to be allowed to show cause against the validity of the civil imprisonment. On this being granted, the judgment creditor files his claim for civil imprisonment, by way of *verbaal*, with the commissioners. The imprisoned debtor, by way of answer, puts in his written *tender* (*presentatie*), which contains a statement of the manner in which he alleges the judgment ought to be satisfied; after filing this pleading he is released by a provisional order. The case is then brought to an issue, the parties interchange copies of the inventory and documents, each party puts in a *memorie* or *deductie* (vide supra, p. 324), to have the question as to civil imprisonment decided by judgment of the court, upon the report of the commissioners (4). If the imprisoned

(1) *Jud. Pract.* 3 B. 7 H. § 3.

(2) *Ampl. Instr.* van 1579, Art. 44.

\* Performance of which was decreed by the judgment.—Tr.

(3) *Ibid.* Arts. 15, 16.

(4) *Judic. Pract.* 3 B. 7 H. § 5.



debtor's tender (*presentatie*) is held satisfactory, this judgment contains a declaration that it will suffice, and that there shall be no further imprisonment. But if the tender is not satisfactory, it is decreed by the judgment that the tender of the imprisoned debtor will not suffice, and that he must remain in prison until he shall have satisfied the judgment. This is called a *decree of civil imprisonment*. In this kind of civil imprisonment there is no provisional release, but the imprisoned debtor must remain in prison until he has satisfied the judgment. If any dispute still exists as to the manner in which the satisfaction is to be made, the imprisoned debtor may file an *acte van voldoening* (lit., a deed of satisfaction); the execution creditor is bound, if he is not satisfied with it, to state his reasons in writing; then the imprisoned debtor files another *acte van voldoening*; if the judgment creditor still considers it unsatisfactory, the High Court delivers a judgment by way of a *decree of civil imprisonment*, which points out exactly and concisely the manner in which the judgment must be satisfied, and the parties are not heard any further upon the imprisonment (1).

## SECTION XVII.

Liquidation of  
the judgments.

In order to be able to levy execution, immediately after the delivery of the judgment, it is necessary that the sum be fixed and stated therein; but in case the judgment condemns a party to pay an uncertain sum, a *liquidation of the judgment* (2) must first take place: i.e., the sum must first be reduced to a certain amount.

(1) *Jud. Pract.* 3 B. 7 H. § 6.

(2) *Instr. H. R. Art.* 260, *seqq.*

The cases in which this course must be adopted are chiefly the three following:—

1st. *Judgments for costs.* These costs cannot be assessed just as one pleases, and execution levied for them (1), but the amount must first be determined by a judicial taxation. For that purpose a *declaration of costs* is filed; the party condemned to pay them may put in his objections against any items; and when the applicant has on his side filed his contra objections, the High Court issues a *deed of taxation*, by which the costs are fixed at a certain amount, and by virtue of which execution is taken out in default of payment (2).

Taxation of costs.

2nd. *Judgments to repay costs, damages and interest.* When a statement of the amount thereof has been given to the opposite side by way of *memorie*, and no payment follows, the successful party files a document which is called a *declaration of the costs, damages and interest*, in which every item of the compensation demanded is set out, and which concludes with the prayer, “that by judgment of the court the costs, damages and interest may be taxed at the amount stated, with costs of suit.” The party condemned to pay pleads an answer by way of *debat*, and the case is then proceeded with as in matters of account (3).

Costs, damages and interest.

(1) On the manner in which respectable practitioners ought to draw these declarations, *Memoriën*, framed by advocates and attorneys at the Hague in the year 1770, upon this subject and delivered to the Court, deserve to be consulted. They are to be found in my *Anteek op Merula's Man. van Proced.* 2 D. pp. 437–454, and in the form of an abstract in my *Judic. Pract.* 4 B. 3 H. §§ 3–5.

(2) Vide *supra*, p. 282.

(3) Van Alphen, *Papeg.* 1 D. p. 781, *seqq.* *Jud. Pract.* 4 B. 3 H. § 6.

Debate of an  
account.

3rd. *Judgment to examine, debate and settle an account.* When the account has been rendered and the papers in proof of its correctness have been submitted for a reasonable time for the inspection of the person entitled to the account, the latter, if he considers that he ought not to bear any of the items in the accounts, pleads by way of *debat*; the person rendering the account answers by pleading a *contra-debat*. The matter is then brought to an issue by *solution* and *supersolution*, which stand on the same footing as replication and rejoinder; the parties then interchange copies of the inventory and documents, and each puts in a *deductie* (1). When, after all this has taken place, the costs, damages, and interest, or the balance of the account, have been reduced by the judgment of the court to a fixed amount, execution is levied for it (2), in the same way as we have stated above in personal actions.

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## CHAPTER X.

ON MATTERS RELATING TO ESTATES WHICH REQUIRE PROVISION TO BE MADE FOR THEM BY THE COURT.

### SECTION I.

Providing for  
estates.

THE estates of persons whose affairs have become so embarrassed that they are obliged to stop payment, abandoned estates, and estates without an owner, require some special provision to be made by the court. In very many places there are special *ordi-*

(1) Van Alphen, *Papeg.* 1 *D. p.* 793, *seqq.*; *Jud. Pract.* 4 *B.* 3 *H.* § 7.

(2) Vide §§ ix.-xiv. of this chapter.

nances (1) upon this subject, and in large towns even special chambers. Of course, where such ordinances exist, they must be followed in the first place. But where there is no local law the following rules may serve as a guide.

## SECTION II.

Provision is made for estates in case of insolvency, Appointment of trustees or sequestrators. *either* upon the application of the debtor himself, *or* of one or more of his creditors, upon it sufficiently appearing that debts are legally due to them, and that the debtor is undoubtedly insolvent, *or* if a person has applied for *letters of cession*, and thus himself declares that he is unable to make payment; *or*, if a person's estate is abandoned and without an owner. It (the provision) consists in the appointment of one or more persons who are deemed fit to take charge of the estate (2). They are called *sequestrators or curators* (trustees).

## SECTION III.

It is their duty, immediately after the sequestration Their duty. *or* curatorship is granted, to repair, and if need be accompanied by commissioners of the court, to the house of the debtor, and immediately to seal up the coffers, chests, writing desks, counting-house, and whatever else may be deemed necessary to place the books and papers in safe custody. Moreover, to place a person

(1) These are to be found *passim* in the published Town Ordinances. Several are also met with in the *G. P. Boek*, especially in the fourth volume.

(2) *t. t. ff. de curat. bon. dando, ibique D. D.*



appointed for that purpose in charge of the estate. If however, the debtor has left the house in which he lived, with all his family, it is shut up by order of court.

It is their duty also immediately to draw up an inventory of the estate, to realise the property of a perishable nature, to call in the outstanding debts with all diligence—but they have no power to sue for them without first consulting the court—and to pay the moneys rescued into court to the secretary (*consignatie*) (1).

#### SECTION IV.

Composition  
with creditors.

It is very common in this case for the debtor whose estate has been placed under the administration of the court to try to extricate himself from his embarrassments by entering into a compromise with his creditors, and to be placed in possession again of his estate. This may also happen if a local law enacts that the minority of the creditors shall submit to the wish of the majority (2); but where there is no such law, and consequently the common law prevails, according to which no creditors can be forced to agree to a composition by which their claims would be reduced (3), the authority of the court is of little avail, and the authority of the sovereign is absolutely necessary to confirm the composition; and this means has been made use of now and then within the last few years (4).

(1) Matthæus, *De Auction*, L. 1, C. 7.

(2) Such laws exist at Leyden, Haarlem, Amsterdam, Rotterdam, and in other places. V. d. Keessel, *Thes. Jur. Hol. & Zeel.* Thes. 829.

(3) *Ordonn. van Keizer Karel van 19 Meij*, 1544, Art. 35.

(4) *Resol. Holl.* 22 Julij, 1779, G. P. B. 9 D. p. 551.

## SECTION V.

For the further liquidation of the estate it is necessary to give notice to the creditors, by public advertisement in the newspapers, to lodge their claims with the secretary of the court; to sell and realise all the property in the estate: viz., the immovable property at such times of the year as are suited for this purpose, and the movables as it may be deemed most advantageous, according to the special customs of each place; and in general to liquidate the estate as soon as possible.

Further liquidation of the estate.

## SECTION VI.

When this final liquidation has taken place, the trustee (*sequestrator* or *curator*) must draw up an account of his administration, which, in presence of the court, after the creditors have been summoned to appear for this purpose, is audited and passed (1). Then the creditors who have come forward must *justify* their claims before the court. Then the entire proceeds of the estate are divided among those creditors who have justified their claims. This is termed holding a *judicium of preference and concurrence* (2). And in pursuance of the *verbaal*, or judgment delivered, each creditor may take out of court the money adjudged to him, upon giving security for the repayment, if afterwards any person should appear who has a better claim to it.

Rendering of accounts and ranking of creditors.

(1) Voet, *ad tit. ff. de curat. bon. dand. n.* 10.

(2) Matthæus, *De Auct. L. 1, C.* 17.

## PART II.

### ON THE MODE OF PROCEDURE IN CRIMINAL CASES.

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#### CHAPTER I.

##### ON THE INSTITUTION OF CRIMINAL PROCEEDINGS IN GENERAL.

###### SECTION I.

What parties  
are necessary.

JUST as, in all civil lawsuits, three parties are necessary—the plaintiff, the defendant, and the judge—so also in a regular criminal proceeding three parties are required, the *complainant*, the *accused*, and the *judge*. Each of them must fulfil certain requisites, and has special duties, which we shall shortly explain.

###### SECTION II.

The complainant.

Although, according to the Roman law, every person had the right of lodging an accusation (1), provided he submitted to the same punishment if it were found that he had brought a false charge (2), yet that practice has not been adopted in our country, but the prosecution of crimes with punishment, belongs to the sovereign (3), who for the institution thereof

(1) § 1, *Inst. de Publ. Jud.*

(2) *L. 3, L. 7, ff. ; L. ult. C. de accus. & inscr.*

(3) De Groot, *Int. 3 B. 4 D. § 5, 32 D. n. 16, and 33 D. § 3, n. 7.*

has appointed a public prosecutor to every court of criminal jurisdiction, with the title of *head officer, high sheriff, bailiff*, and the like (1).

### SECTION III.

As to the *accused* there is little to be said, except The accused. that he must be a person capable of committing crimes. No criminal proceedings can therefore be instituted against persons wanting in will and understanding: e.g., mad persons, little children, etc., because they are not capable of committing crimes (2). The fact that they are minors or married women is immaterial, because the *assistance* of their father, guardian, or husband is unknown in extraordinary criminal proceedings (3).

### SECTION IV.

In order to be a *judge* in criminal cases, it is The judge. necessary:—

1st. That he be vested with *high jurisdiction*. In the towns this belongs to the College of Schepenen, who for ages have tried offences committed by the citizens or inhabitants of their towns (4). In various districts of Holland the *high jurisdiction* is exercised by the

(1) P. van Spaan, *Verhandeling over het hooge Regtsgebied in Holland en Westvriestl.* ('s Hage, 1780).

(2) Vide *supra*, p. 176, *et seqq.*

(3) Vide *supra*, p. 39. We cannot agree with what Professor Voorda, *Aanteek. op den Crim. Stijl. Art.* 61, p. 427, says upon this subject, as well as on many other points. The universally-adopted practice in this country, founded upon a just analogy of the law, is to reject the husband as a matter of course.

(4) Vide on this subject a number of charters of the town in Mieris, *Chart. Boek.* 2 D. p. 808, 3 D. pp. 87, 125, and in many other places.



Bailiff and Well-born men: thus there are the high tribunals of South Holland, Kennemerland, Rhyndland, Schieland, etc. (1). The College of Schepenen has *high jurisdiction* also in various large villages, and is competent to try criminal offences (2).

2nd. That he be the *competent* or proper judge, with regard to the *person* of the accused. It is in this respect an indisputable law that no inhabitant of the countries of Holland and West Friesland, not absconding nor caught in *flagrante delicto*, can be apprehended or tried except by the officer and the court who are with respect to such inhabitant the ordinary daily and competent officer and court (3). The meaning of this is, that the courts having jurisdiction over the territory in which the criminals have their *domicile* are in the first place competent to try the offences, and that the courts of the *place where the crime was committed* are only competent if they have caught the criminal in *flagrante delicto*, or have summoned him to appear if he has absconded (4). Vagabonds and tramps may be tried where found and apprehended (5).

(1) Vide *supra*, p. 256.

(2) Thus there are several, for instance, in Rhyndland, who are not subject to the bailiwick. S. van Leeuwen, *Cost. van Rhyndland*, *Int.* p. 19.

(3) *Plac. Holl.* 15 Sept., 1677, *G. P. B.* 3 *D. fol.* 1385.

(4) *Verklar. Holl.* 16 Dec., 1678, *G. P. B.* 4 *D. fol.* 499, where a typographical error, very contrary to the meaning, has crept in, and we must read at p. 500, col. 2, *in. init.*, "the officers and courts having jurisdiction over the territory in which the offenders have their domicile, to the exclusion of the officers and courts of the places, &c.," instead of the words, "the officers and courts of the places," &c.

(5) *Crimin. Ordonn. Art.* 50.

SECTION V.

In some cases the High Court of Holland is also a competent court of the first instance in criminal cases.

When the  
High Court  
has jurisdic-  
tion.

1st. When Members or officers of the High Court commit an offence (1).

2nd. When an offence has become prescribed, and has remained untried (2): of which the High Court is then competent to take cognizance by *præventie* (3). Against all these persons the rights of the crown are exercised in the High Court by the *Advocate Fiscal* or *Attorney-General of Holland* (4).

SECTION VI.

Both the public prosecutors and the Courts are bound to proceed in criminal cases according to the law. By this law is understood the *ordinances upon criminal justice, and relating to criminal procedure, both of the year 1570* (5), but modified and moderated by a just and regular practice, such as one may see continually followed in the principal criminal courts. This last qualification we consider highly necessary; for although no one can with reason deny that these ordinances have the force of law in this country (6),

What laws to  
be observed.

(1) *Provis. Ordre van 27 Sept., 1614, Art. 9; Resol. Holl. 14 Maart, 1765, Art. 3.*

(2) *Instr. Hof, Art. 8.*

(3) Bort, *Tract. van Crimin. Zaak. Tit. 1, n. 51; Zurck, Cod. Bat. voc delicten, § 7, & ibi not.*

(4) *Judic. Pract. 1 B. 3 H. § 19.*

(5) Professor Voorda has given us both these ordinances very accurately in his *Verhand. over de Crimin. Ordonn.* (Leyd. 1792, in 4to).

(6) Voorda, *d. l. Inleid. § 5, p. 8.*

yet they exhibit so much and in so many respects the want of civilisation of the times in which they were passed, that it is to be regretted that, in spite of the repeated commissions (1) appointed for this purpose, they have hitherto not been replaced by some better ordinance upon the mode of procedure in criminal cases, and the uncertainty of the criminal practice thereby removed.

## SECTION VII.

Apprehension  
in *flagrante*  
*delicto*.

If a person is caught in the commission of a criminal offence, the public prosecutor is entitled, nay, even bound, to secure the person of the offender without first giving notice to the court. This is called *apprehension in flagrante*, or apprehension in the actual commission of the act. It is not absolutely necessary in this case that the offender should still be in the act of committing the crime; but persons are considered to be caught in *flagrante delicto* if they are caught or discovered and detected while running away or concealing themselves just after the commission of the act (2).

The judgment to be formed upon all these points is left to the discretion of the court. As soon, however, as the apprehension in *flagrante delicto* has been made, the public prosecutor is bound to give immediate notice to the court, and to request its approbation or sanction of the apprehension (3).

(1) A fine historical account of these commissions is to be found in the above-mentioned *Inleiding voor het Werk van Prof. Voorda. The Mode of Procedure*, framed by a commission appointed for that purpose in 1799, certainly contains much good matter; but the time was too unfavourable, and it would be necessary to revise their mode of procedure.

(2) Matthæus, *De jure Gladii*, Cap. 38, n. 9.

(3) *Crimin. Ordonn. Art. 50.*

### SECTION VIII.

According to general rule, all criminal prosecutions for the commission of crimes must be commenced by instituting an inquiry and collecting evidence :—

Preliminary  
depositions.

1st. That a crime has actually been committed ; or as it is usually called, there must be proof of the *corpus delicti*. Under this head is classed the viewing of the corpses of the persons killed, the examination of the traces of burglaries and the like (1).

2nd. As to who the person is who committed the crime.

For this purpose the public prosecutor takes *preliminary depositions*. If these consist, as they generally do, in the statements of witnesses, he must examine them before the court itself, who has to decide whether or not to grant a decree (2).

It is an abuse to put private or notarial declarations, which the sheriff himself has drawn up, into the hands of the court as if they were *preliminary depositions*. The court ought always to hear the witnesses itself, inasmuch as the taking of depositions is directly part of its office (3).

### SECTION IX.

All criminal proceedings, after the depositions have been collected and properly taken, are instituted in one of the two following ways : either by *arrest* or by *summons to appear in person*.

(1) Vide *supra*, p. 239.

(2) *Crimin. Ordonn. Art.* 51.

(3) *Crim. Stijl, Art.* 4 ; and on this, *De Aanteek. van Prof. Voorda*, p. 280.



The necessary requisites for a *decree of arrest* (besides the general requisites, that there must be proof of the *corpus delicti* and that the *preliminary depositions* have been properly taken), consist in the following: that a punishment is imposed by law upon the act committed by the accused, to execute which the person of the accused is required (1). If there appears to be no such law, or if it is very doubtful whether the crime can always be considered of such gravity, then proceedings by way of apprehension are improper, and the proceedings must be by summons to appear in person (2).

As it very often happens that persons who have committed a criminal offence, from fear that justice will pursue them, save themselves by flight, and thus prevent the public prosecutor from putting them in prison, all *criminal writs* of the High Court, and also the *decrees of arrest* of the lower courts, contain a second clause, by which the Fiscal or sheriff is authorized, in case the accused has taken to flight and cannot therefore be taken prisoner, to summon him by public edict, and by serving a notice at his last place of residence, to appear in person, upon pain of banishment (3).

(1) P. Bort, *Tract. van Crimin. Zaken*, Tit. 5, n. 8.

(2) How very careful ought one to recommend a criminal judge to be in this case! It is no small matter to cast an inhabitant into prison, and thus to cast a slur upon his character and to cause him pecuniary damage, which a subsequent discharge can never completely wipe out. And above all, head officers and sheriffs ought most carefully to see that their *officers*, who are often persons who take too much upon themselves by virtue of their office, and possess too little education and honesty, act more regularly in these cases than, alas! one often sees them do.

(3) Van Alphen, *Papeg.* 1 D. p. 581; S. van Leeuwen, *Cens. For. P.* 2, L. 2, C. 6, n. 9.

According to the provisions of the law the term of *fourteen* days between each edictal citation, which is repeated three or more times if the person summoned remains away, is sufficient (1): however, in many places the edictal citation is issued *from six weeks to six weeks*, and this practice is certainly not without reason; but it is unnecessary and superfluous to advertise these citations in the newspapers, as is done in some places.

#### SECTION X.

If the criminality of the offence does not appear sufficiently clear to the court, and it therefore finds no reasons for granting a decree of arrest, then the *decree of a summons to appear in person* must be taken into consideration. Although this course is not nearly so violent and prejudicial as the former, yet all summonses to appear in person involve such a disgrace, that an old citizen ought not to be exposed to it except in cases of pressing need; and therefore the act for which a man is summoned to appear in person should always be of such gravity that the law considers it as a *crime*, and imposes a *criminal punishment* upon it (2). In cases of small importance, and of such a nature that they may be dismissed with a slight *correction* or reprimand, no summons to appear in person should be granted; and it certainly is not a proper course to adopt in cases in which the law only imposes a fine, and in which the sheriff must proceed in the usual manner, without the necessity for any decree to do so.

Summons to  
appear in  
person.

(1) *Crimin. Stijl*, Art. 53.

(2) Bort, *Tract. van Crimin. Zaken*, Tit. 5, n. 43, et seqq.

The writs and decrees of summons to appear in person are not served upon the party summoned in person, nor are copies delivered to him, but a document is simply served upon him by which he is summoned to appear in person upon some fixed day. In the lower courts the offence for which the party is summoned to appear in person before the court must be set out in this document, and even in the edictal citation (1). In the High Court the crime with which the party summoned is charged is not set out in the document summoning him (2).

## SECTION XI.

Other modes  
of instituting  
criminal pro-  
ceedings.

All other modes of instituting criminal proceedings, besides decrees of arrest and of summonses to appear in person, are irregular and reprehensible.

1st. That sheriffs should of their own accord, and without being in possession of a judicial decree, cause a person to be apprehended in case of offences which, although criminal, can no longer be considered *in flagrante*, is a matter attended with such evil consequences that it cannot be opposed too strongly (3).

2nd. Sometimes an indirect method is adopted: viz. if a person lies under a certain suspicion which is not strong enough to found a decree upon, to call upon him

(1) *Crimin. Stijl*, Art. 53.

(2) Bort, *Tract. Crimin. Tit. 5, n. 30*. It has been doubted, and we think rightly so, whether this practice of the High Court can be called just and proper. Voorda, *Over de Crimin. Ordonn.* 1 H. §§ 25, 26, p. 93, *seqq.*, and p. 398.

(3) *Crimin. Ordonn. Art. 50*, and S. van Leeuwen in his *Aanteek.* on this point.

to appear before the court (1), and there to cross-examine him, and when it is considered that something criminating him has fallen from his own lips, to have him arrested; but this is a base course, which ought to be banished from every tribunal.

3rd. Now and then proceedings are commenced by placing the accused, upon a provisional order, in *civil imprisonment*. In crimes of some consequence, the author of which cannot be ascertained with perfect certainty, unless he fixes the commission upon himself with his own lips (e.g., the genuineness or falsity of a signature which is supposed to have been signed by him), it is safer to commence with this step than immediately to cast upon a person the indelible slur of a criminal arrest. Yet, in spite of this, the security and liberty of the inhabitants demand that this course should be adopted as little as possible; because too much circumspection and caution cannot be used in depriving a fellow citizen of his liberty, even if it is called by the specious name of *civil arrest* (2).

4th. Lastly, there is a course which has been occasionally adopted which is known by the name of *political custody*. In cases of urgent necessity, and for the preservation of the public security, the government or the governors of a town may sometimes find themselves placed under the dire necessity of securing the persons of certain individuals; but this is always a dangerous

(1) Is a citizen bound to appear to such a summons? In *Leyden* there is an express enactment upon this subject. See the 85th Local Statute of that town. But how if there is no law? Out of respect to the sovereign or the courts, no one ought to refuse to obey; but then the summons ought not to be a trick.

(2) *Judic. Pract.* 4 B. 5 II. § 7.



course, and only the most sparing use should be made of it (1).

## SECTION XII.

Purging or clearing oneself from imputation of crime.

In treating of criminal cases in general, we cannot pass by without shortly noticing the remedy of *purgation* (2). If a public rumour is circulated about a person that he is guilty of some crime, and he wishes to be publicly cleared of this imputation, he may apply by petition to the High Court, which undoubtedly has jurisdiction in the matter (3), for a *writ of purgation* against the law officer of the locality,\* to the Attorney-General of the High Court, and all other persons who might wish to oppose (4). Upon the return day the applicant appears bare-headed at the Rolls, and by his attorney files his claim, praying "that he may be declared stainless and innocent of the crime stated in the writ; and that by provisional order he may be released from appearing in person, and be permitted to appear by attorney, upon giving his word [*hand-tasting*] to appear again in person whenever called upon." When this claim has been filed, the Law Officer and Attorney-General may make an application that the plaintiff be *examined upon interrogatories* (5).

(1) H. de Groot, *Apolog. C.* 13, especially p. 138.

(2) Vide with respect to this remedy, P. Bort, *Tract. van Crimin. Zaken, Tit. 3, van Purge*; W. van Alphen, *Papeg.* 1 D. 34 H. pp. 514-528, and 2 D. pp. 504-510.

(3) *Instr. Hof, Arts.* 8, 226.

\* Where the rumour is spread.—TR.

(4) Van Alphen, *Papeg.* 1 D. p. 519.

(5) Van Zurck, *Cod. Bat. voce Purge*, § 1, n. 5, in not. *Manier van Proced. van 1729, Tit. 23, C. 5, n. 9*; De Haas, in not. *op Merula's Manier van Proced. L. 4, T. 24, C. 12, n. 10, p. 421.*

Sometimes the parties summoned allege *præventie*, and plead an exception to that effect. A person is considered to be stopped by *præventie*, not only if a decree had already been granted before the writ of purgation was served, but also if preliminary *depositions* had been taken before that time (1).

If by evidence, oral or otherwise, the applicant is far from being found innocent, his rash proceeding is followed by a criminal prosecution, either ordinary or extraordinary, with or without imprisonment, according to the nature of the case.

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## CHAPTER II.

### ON EXTRAORDINARY CRIMINAL PROCEEDINGS.

#### SECTION I.

WHEN the accused has been apprehended or summoned to appear in person, *extraordinary* criminal process is first instituted. What is meant by this? Nothing else than "a judicial inquiry into the case, held in accordance with the preliminary depositions, and consisting in the examination of the accused and confronting him with accomplices and witnesses, in order to try if by these means he can be brought to confess the crime" (2).

(1) Loenii *Decis. Cas.* 2, 15, & 60, and *aldaar* Boel, *in not.*

(2) Thus this subject is defined by Bort, Van Leeuwen, and all the writers on criminal law in our country. Thus the immemorial practice of the High Court and all criminal courts teaches us. Professor Voorda, however, in his above-mentioned *Verhandeling over de Crimineele Ordonnantiën*, wishes to establish a system quite different from all this. He regards the positions taken up by Bort and Van Leeuwen as mistakes and blunders; he is pleased to call

Is the extraordinary mode of procedure in criminal cases, as described here, fair or not? Certainly no one can deny that this mode of procedure is occasionally abused both by judges as well as by sheriffs, who are wanting in integrity and knowledge, for the oppression of the innocent. But to abolish an otherwise good and necessary proceeding from practice on account of this abuse, to which all legal forms, if badly applied, may give rise (1), would be to fall into another extreme, which is still worse; since experience furnishes indisputable proof that if the *extraordinary process* (provided however it remains within the strict limits of justice) were not used against persons accused of crimes, the most atrocious crimes committed in secrecy, and the accomplices in which are often not detected, such as burglaries, frauds, and the like, would have to be left unpunished (2).

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the present extraordinary process a monstrous absurdity (p. 100); he is not in favour of the examination of the accused if the case can be tried upon evidence, or of confronting him with witnesses, but only with accomplices; he is pretty strongly in favour of torture, even when the evidence is very unsatisfactory. Verily, strange and peculiar ideas! Gladly do we respect the memory of a man who as a Roman jurist was really great; but however much matter worth knowing there may be scattered in this *Verhandeling*, yet for forming a judgment upon criminal practice we prefer a just and keen judge, who daily attends examinations, to a highly learned person in his study.

(1) "Cum recte procedunt judicia, delubra sunt æquitatis; cum depravate, foveæ fallaces et coecæ." Ammian. Marcellin. *L.* 30, *C.* 4, p. 487. (*Edit. Ernest.*)

(2) P. M. Renazzi *De ordine seu forma judiciorum criminalium* (Romæ, 1777, 8vo); E. Luzac, *Diss. de modo extra ordinem procedendi in causis criminalibus* (*L. B.* 1759); H. Calkoen, *Verhand. over het voorkomen en straffen der Misdaden in de Verhand. van 't Genootschap, Floreunt liberales artes*, 2 *D.* 2 *Stuk.* pp. 211-228.

## SECTION II.

Before treating of the course of the extraordinary process, it will not be inconvenient shortly to mention the *applications* and *incidental motions* which may arise therein. Applications and incidental motions in this process.

1st. These seldom happen in the course of extraordinary process against a person already arrested, except where he has been placed in criminal imprisonment by virtue of a decree of a judge whom he considers to have no jurisdiction, or to be *incompetent* in this respect. But in what way must the *exception of incompetency* (i.e., to the jurisdiction) be taken? On this point the law is very obscure and uncertain (1). The States of Holland have declared in a certain case that it must be done upon petition, followed by a process *communicatoir*, with short periods for pleading (2). Subsequently the High Court again complained of this mode of proceeding (3). This is certain, that the proceedings in such a case should be made as summary as possible without trenching upon the extraordinary nature of the process (4).

2nd. In case of a summons to appear in person, an application is made immediately upon the return day (5)

(1) *Crimin. Stijl*, Art. 19.

(2) *Resol. Holl.* 9 Jan., 1744, *G. P. B.* 7 D. fol. 969.

(3) *Missive van t' Hof, van 6 Meij*, 1744, to be found in the papers in the *Proces. van v. d. Mieden*.

(4) Compare Professor Voorda, *Aanteek op den Stijl*, Art. 19, p. 311, *et seqq.*

(5) Professor Voorda, *Aanteek. op den Stijl*, Art. 52, has no end of objections to this application at the Rolls, and he is right; but such is the practice, and we must follow it so long as it is not altered.



“that the person summoned may be ordered to answer interrogatories, to be handed in to the judge.” Any desire to oppose this application would not be listened to; since the indispensable consequence of a summons to appear in person, so long as it is not changed into a simple summons, is the obligation of the party summoned to appear in person to answer upon interrogatories. Consequently the person summoned to appear in person usually declares by his attorney, by noting upon the Rolls, “that he is prepared to answer upon the interrogatories to be put to him, provided that, after the examination is completed, copies both of the interrogatories and the answers given to them be delivered to him” (1).

3rd. Since the writ of summons to appear in person must set out the crime, the practice has been adopted—whenever this setting out has *either* been omitted, *or* is too vague and uncertain—to *apply for the particulars* of the time, place, and other circumstances of the crime. In determining the justness of this application, everything depends upon the question, whether the statement in the summons is so uncertain that the party summoned cannot gather from it upon what subject he is to be examined. In such a case the application is reasonable. But if its object is to have all the special circumstances stated beforehand, then it is part of the examination, and the application is nothing but a trick of practice (2).

4th. If any one is summoned to appear in person in a matter which might involve corporal punishment, but the evidence of which is too weak to justify the

(1) *Judic. Pract.* 4 B. 5 H. § 6, p. 227.

(2) *Ibid.* d. l. p. 226.

court in granting his immediate arrest, and the guilt of the person summoned is more clearly established by one or more examinations, the Public Prosecutor makes an *application for incarceration*, or that the person summoned may be ordered into close confinement. This application is made secretly; the accused is not heard upon it; and the judge decides as in conscience he is bound to do (1).

### SECTION III.

The first and principal part of an extraordinary criminal process is the *examination* of the prisoner or the person summoned to appear in person. Examination of  
prisoner.

1st. The examination must take place within four-and-twenty hours after the arrest; and the further examination must take place as soon as possible, as it is the duty of the judge to shorten the imprisonment as much as possible (2).

2nd. The questions put in examination must be based upon the preliminary depositions, and so framed that they can generally be answered by the accused by a *yes* or *no*. It is permitted however to call upon him to state the circumstances of the case; to give reasons for his answers; to clear up what is doubtful; to explain inconsistencies in his answers, and the like (3).

3rd. Diffuseness, by which the case is thrown into confusion, and an innocent person even put into danger of contradicting himself, is an unpardonable

(1) *Crimin. Stijl*, Art. 52.

(2) *Ibid.* Art. 6.

(3) *Judic. Pract.* 4 B. 5 H. § 9.

fault in criminal examinations, which should be concise; although two or more facts may not be contained in the same interrogatory (1).

4th. They should be clear, in plain language, and simple; free from all unintelligible bastard words; and not expressed in an involved or abstruse style. If it is noticed that the prisoner does not understand the question, it must be explained to him clearly and in other words.

5th. All *catch questions* should be guarded against: i.e., questions in which the reasoning is based upon the supposition that some fact is true and proved, whereas the prisoner has not yet been examined upon this fact, and is much less likely to confess it (2).

6th. In writing down the answers, the prisoner's own words ought to be used as far as practicable, lest, by altering the wording too much, the facts be distorted, placed in a wrong light, and the prisoner be made to say something quite different from what he intended.

7th. The prisoner must be examined without administering an oath, on account of the obvious danger of perjury being committed (3).

8th. Since it is the duty of all judges, nay, even of the Public Prosecutor to inquire into the *innocence* as well as the *guilt* of the accused, he is bound to hear all witnesses called by the accused on his behalf; and also to accept all documentary evidence or *memorials*

(1) *Judic. Pract.* 4 B. 5 H. § 9.

(2) *Ibid.* d. 1.

(3) Voet, *ad. tit. ff. ne jurejur. n.* 10. Whatever the *Crimin. Stijl*, Art. 6, may provide upon this point, it is certain that it is not adopted in practice. How could Professor Voorda, *Aanteek. op dat Art.* p. 290, still have any doubts about it?

produced in his defence by his family or friends (*Memoriën van suggestie*) (1).

9th. Lastly, after the close of each examination (in some places after all the examinations are ended), the interrogatories and answers must be read over to the prisoner, in order to ascertain whether he wishes to add anything to or alter them. And then they are signed by the prisoner (2).

#### SECTION IV.

If the accused denies the charge laid against him, it is of the nature of the extraordinary process that he should be brought by proper means to conviction and confession of the crime; for this purpose it may be useful, for example, besides cross-examining the accused, to place before him the stolen goods, the crowbars found upon him, the instrument by which the wound was inflicted, etc. Such things often do more towards a conviction than the most subtle cross-examination. But it is most usual in this case (3) to make use of the means of *confrontation*, or of confronting the accused with accomplices and witnesses. *Confronting him with accomplices* is only useful to get behind the truth in cases of secret offences, especially as to the particular circumstances. In other respects, they are witnesses whom the law wholly rejects (4), and

Confronting  
prisoner with  
witnesses.

(1) *Crimin. Stijl*, Art. 46.

(2) *Ibid.* Art. 11.

(3) Whatever Professor Voorda, § 12, p. 64, *et seqq.* *Aanteek. op den Stijl*, Art. 13, p. 299, may have to say against the means of *confronting*, we must differ from him *in toto*; and we hold, from experience, that this means is one of the most honourable and most suitable for obtaining a confession in extraordinary process.

(4) *L.* 3, § 5, *ff. de testib.*; *L.* 11, *C. eod.*; *L.* 17, *C. de accus.*



at the very utmost no greater weight is attached to their evidence in passing sentence than to explain and supplement other evidence (1). But *confronting him with witnesses* is, as it were, a sort of examination of witnesses, *in forma probanti*, adapted to the nature of extraordinary criminal proceedings.

It must not only be used to tax the accused to his face with the commission of the crime, and thus to silence him in his obstinate denial, but also to give him an opportunity of alleging what he has to say against the witnesses themselves, to enter into conversation with them, and thus to weaken or strengthen the credibility of the witnesses (2).

## SECTION V.

Confession and subsequent demand.

The result of examination and confronting very often is, that the accused is thereby brought to *confess* the crime committed by him. In order that a confession may be perfect, and that sentence may be passed upon it, it is not enough if the accused confesses the deed, but he must also confess the criminality of the act, unless the very name of the deed itself implies such a criminality that it cannot be conceived of otherwise than as a criminal act: e.g., if a person confesses that he has coined or minted any money, by the confession of this act he at the same time confesses a crime, and there is no need for him to add anything further, because coining money, without the authority of the crown, is considered a crime by

(1) H. Coccejus, in *Exerc. Curios.* Tom. 2, Disp. 30, de socio criminis; Boehmer, ad *Const. Crimin. Carol. Art.* 31, pp. 143-152.

(2) Quistorp, *Grundsätze des Deutschen Peinlichen Rechts*, 2 Th. 14 H. §§ 713-721.

the laws of the land. But if, for example, a person confesses that he has written a little book which the Public Prosecutor alleges contains libellous expressions, but the accused denies that the expressions are libellous, then his confession is not sufficient for sentence to be passed upon it (1). If the confession is complete in the way just mentioned, and is therefore a *criminal confession*, the Public Prosecutor puts into court his observations and opinion, together with the papers, and prays that he may file his claim upon the confession. If the court is of the same opinion, permission is granted to him to pray for judgment upon the prisoner's confession, and to file his criminal declaration (2).

This declaration contains a circumstantial account of the crime, collected from the examinations of the accused, and strengthened or amplified here and there by the depositions which have been taken; a statement of the criminality of the act, and of the particular law which the accused has transgressed, and, lastly, a prayer that the punishment affixed by law may be inflicted. As punishments, however, are by our criminal law seldom exactly defined, but are generally discretionary (3), it is prudent and usual, after praying for a definite punishment, to add a more general clause, "*or such other punishment as to this court shall seem just and meet.*"

(1) On this very important distinction compare the *Contramemorie van den Hoogen Raad in de zaak van Mr. Adriaan van der Mieden*, and also the *Memorie in de zaak van Hespe en Verlem*. *Amst.* 1786.

(2) *Public van het Uitvoer. Bewind.* van 10 Oct., 1798, *Art.* 3 & 4.

(3) Matthæus, *de Crim. in Proleg.* C. 4, n. 10, & L. 48, T. 18, n. 31.

## CHAPTER III.

## ON CRIMINAL PROCEDURE UPON CONVICTION.

## SECTION I.

Torture  
abolished.

IT very often happens that accused persons, in order to escape punishment, persist in their denial, notwithstanding the evidence taken against them. In former times it was very common in cases of grave offences to make an application that the prisoner should be put to *sharper examination* (torture). There have been no end of controversies as to the lawfulness and utility of this measure, and also as to the exact cases in which it ought to take place (1). Since torture has been expressly abolished, this knotty inquiry has become unnecessary; and in no case whatever may a judge, in order to obtain a confession from an accused person, make use of any means which may cause pain or suffering, or threaten it in case the accused persist in his denial. This, however, does not prevent a judge, in case the accused, whether under arrest or summoned to appear in person, refuses to answer the interrogatories put to him or any of them, and persists in his refusal after the judge has reminded him of his duty, from compelling him to do so by such means as the judge may consider suitable (2).

(1) J. Grevii *Tribunal reformatum*; Leyser, *Medit. ad Pand. Tom. 10, Spec. 630, 631, 632, 638, 639, & 640*; D. Jonktys, *over de Pijnback*; Voorda, *Verh. 1, H. § 14 et seq.*; and innumerable others.

(2) *Reglem. 10 Oct., 1798, Art. 1.*

SECTION II.

It would, however, be very prejudicial to the public interests if every accused person against whom the evidence is clear, and whose denial is based only upon obstinacy, had to be proceeded against by way of ordinary process (1). Instead, therefore, of torture, another course had to be pointed out by which cases of this kind could be disposed of without the many formalities of the ordinary process. This is called, passing sentence *upon conviction*: i.e., upon conviction of the conclusiveness of the evidence, although the accused has not confessed the crime: viz., if the judge finds that, although the prisoner cannot be brought to confess the crime with which he is charged, the depositions given in evidence against him are of such a nature that they appear to prove conclusively that the crime has been committed by the prisoner (2), he authorizes the Public Prosecutor to pray for judgment in extraordinary process upon these proofs, and also to file his declaration (3).

Passing sentence upon conviction.

(1) The ordinary process occasions: (1) Tremendous expenses both to the country, if the Attorney-general is the complainant, and to the chief law officers and sheriffs. (2) A very prejudicial delay, especially as an appeal lies. (3) Too many opportunities are given to bad persons, who listen with eagerness to the pleadings, of learning pettifogging technical objections, which they make a bad use of, to the prejudice of justice, when they are themselves accused. The ordinary process ought therefore not to be used except in the few cases which will be pointed out in the next chapter.

(2) The law, it is true, only mentions *prisoners*, i.e., *persons arrested*; but there is no reason why it should not be extended to *persons summoned to appear in person*, of which indeed there are several examples in practice.

(3) *Reglem. Art. 8.*



## SECTION III.

How to proceed in such a case.

The mode of proceeding in this case requires :—

1st. That immediate notice of this judicial decision be given not only to the Public Prosecutor, but also to the prisoner.

2nd. That the prisoner is at liberty to choose one or more practitioners to take, *summarily* and *without any form of process*, such defence for him as he may be advised. If he cannot obtain any practitioner, the court assigns him one or more practitioners for this purpose (1).

3rd. That free access to the prisoner be immediately granted to the practitioner chosen by the prisoner, or assigned to him (2).

4th. That the Public Prosecutor hand into court his declaration and the documents within eight days.

5th. That at the same time copies of this declaration, and of the evidence, put into court by the Public Prosecutor, be delivered to the prisoner or his practitioner (3).

6th. That the costs of making out these copies be paid by the prisoner, but if he is too poor to do this they must be charged to the judicial expenses and costs (4).

7th. That the prisoner's practitioner may apply for inspection of the originals of the evidence, and may apply to the court for this purpose (5).

8th. That the prisoner be allowed to cross-examine

(1) *Reglem. Art. 9.*

(2) *Ibid. Art. 10.*

(3) *Ibid. Art. 11.*

(4) *Ibid. Art. 12.*

(5) *Ibid. Art. 13.*

the witnesses called by the Public Prosecutor, or some of them.

9th. That the prisoner be allowed to put into court all such evidence as he may be able to obtain in his defence, and to add to it a *deductie* or *memorie* of law.

10th. That then the same time the Public Prosecutor may also put into court a *memorie* in support of his criminal declaration (1).

11th. That the time for making the said defence be fixed by the court, according to the intricacy and other circumstances of the case, which time may never be less than fourteen days, and never more than six weeks, without the most cogent reasons (2).

12th. That upon the expiration of the periods allowed for pleadings granted to the prisoner for making his defence, whether he has made a defence or not, the judge must inquire into the case as speedily as possible, and *pass a definitive sentence*, such as he shall think meet and just, from which no appeal lies (3).

#### SECTION IV.

Besides the two cases above mentioned: viz. *either* Discharge under "Hand-tasting." when the accused has confessed the crime, *or* when it is conclusively proved against him, there may yet be a third case: viz., when the person's innocence is not clear, but when, on the other hand, there is not sufficient evidence against him to pass sentence upon, and there is no probability of obtaining, either at present or within

(1) *Reglem. Art. 14.*

(2) *Ibid. Art. 15.*

(3) *Ibid. Art. 16.*

a short time, further evidence, which may, however, perhaps be obtained in time. This is termed a *non liquet* : i.e., that the judge is not satisfied as to the guilt or the innocence. In such a case the judge discharges the prisoner upon giving his word (*handtasting*) \* and promise to appear again whenever called upon, *sub poena confessi et convicti*, i.e., upon pain of being found guilty if he remains away (1).

## CHAPTER IV.

### ON ORDINARY CRIMINAL PROCESS.

#### SECTION I.

When the ordinary process takes place.

SOMETIMES after the examination upon interrogatories and confronting has taken place, the extraordinary process is converted into an *ordinary* one. Formerly this often happened, because the *confession* of the accused was deemed necessary before sentence could be passed upon him (2). Now the ordinary process is very rare, because sentence, even of death, can be passed *upon conviction* without any confession, if the evidence is conclusive.

The cases in which it is still applicable may be reduced to the two following :

1st. If the prisoner has not only denied the crime

\* I.e. Taking the president of the court by the hand, and promising.—Tr.

(1) *Crimin. Ordonn.* Art. 53, *Crimin. Stijl*, Art. 44, *en aldaar* ; Prof. Voorda, *in zijne Aanteek. Reglem.* 10 Oct., 1798, Art. 6.

(2) *Costumen van Rhijnland*, Art. 1 ; Voorda, *Verhand.* 1 H. §§ 33 & 34.

laid to his charge, but if it is moreover uncertain and doubtful whether the evidence produced by the Public Prosecutor is *sufficient* or *not* to convict the prisoner of the crime of which he is accused.

2nd. If the prisoner confesses the commission of the act itself, but not the criminality of the act, and there are reasonable doubts whether the act is *criminal* or *not* (1). Although the court has allowed the Public Prosecutor to pray for judgment upon conviction in extraordinary process, that does not prevent it from rescinding the former order and allowing the prisoner to be tried by way of ordinary process, if it finds upon considering the prisoner's defence that it is very weighty, and worthy of consideration (2).

## SECTION II.

Although in extraordinary process minors and married women, whether they are arrested or summoned to appear in person, do not require to be assisted by any parties (3), yet there is an exception in the case of ordinary criminal process, whether instituted as an ordinary process, or whether it was afterwards converted into such; for in this case minors must be assisted by their parents and guardians, and married women by their husbands (4).

Minors assisted  
by proper  
parties.

(1) *Reglem.* 10 Oct., 1798, Art. 7.

(2) *Ibid.* Art. 17.

(3) *Vide supra*, pp. 38, 349.

(4) *Supplem. nostrum ad Voet, Pand. tit. de judic.* § 12, where a remarkable decision upon this point by Schepenen of Rotterdam, confirmed by the Judgments of the High Court and the Supreme Court, is quoted,



## SECTION III.

Form of ordinary process.

There is very little to be said specially with regard to the mode of ordinary criminal procedure, as it is modelled for the greater part upon the same form as that of a civil process. It will be enough to make the following observations upon it:

1st. It is commenced simply, without any previous summons, as the prisoner is already a party to the proceedings, by the declaration being filed by the Attorney-General or the Sheriff at the criminal Rolls.

2nd. In this ordinary process the periods allowed for pleadings ought to be short and strictly adhered to. In the High Court the terms are from fourteen days to fourteen days, and cannot be extended (1).

3rd. As soon as the declaration is filed the prisoner, by his attorney, applies at the Rolls for copies of the examination upon interrogatories and confronting, and also of the papers referred to in the declaration. It is irregular to demand copies of the other papers and evidence beforehand. For this purpose there is the term for the parties to interchange documents, just as in a civil process (2).

4th. The defence of the prisoner generally consists in a total denial of the declaration, or, as it is called, *general issue (contrarie conclusie)*. If he considers that he can clearly show that the crime he is accused of is not subject to any corporal punishment, he may add to his plea a prayer for *provisional discharge under hand-tasting* (3). Such cases are pleaded orally in court,

(1) *Reglem.* 9 March, 1728, Art. 2.

(2) *Judic. Pract.* 4 B. 5 H. § 13, p. 238.

(3) Bort, *Tract. van Crimin. Zaaken*, tit. 8.

after issue has been joined, and the parties have interchanged copies of the papers. In the High Court, however, they are first treated as causes tried upon documents, and a *verbaal* of *enquête* is drawn up upon it: but, notwithstanding this, they are afterwards decided upon oral pleading in court (1).

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## CHAPTER V.

### ON SENTENCES, EXECUTIONS, AND APPEALS IN CRIMINAL CASES.

#### SECTION I.

ALL criminal sentences passed upon *confession* or *conviction* must contain : Criminal sentences.

1st. A statement of the offence committed by the person convicted, upon pain of their being null and void (2).

2nd. An exact definition of the punishment which the person convicted must undergo.

3rd. A declaration as to the costs of the imprisonment and of the prosecution. The convicted person is almost always mulcted in these costs, even although the punishment imposed by the sentence should differ very considerably from the punishment prayed for in the declaration.

The sentences passed in ordinary process are framed just as in all civil cases, upon the pleadings which are filed.

(1) Vide *supra*, p. 320.

(2) *Staatsreg. van*. 1805, *Art.* 72.

All criminal sentences are passed in the presence of the prisoner,\* or of the person summoned to appear in person, who for this purpose must appear personally at the Rolls (1). If the sentence admits of appeal, and he wishes to avail himself thereof, the appeal must be noted immediately at the Rolls (2).

## SECTION II.

Against persons not appearing.

If the accused does not appear, and has taken to flight, and the proceedings have therefore been taken against him by default, the sentence generally contains a decree of banishment against the accused, chiefly as a punishment for his non-appearance, by which he has not purged himself from the evidence and suspicions by virtue of which the *decreet* (vide *supra*, p. 354) was granted against him. Should he afterwards fall into the hands of justice, the case itself is tried by examination upon interrogatories, etc., in extraordinary process, and the punishment imposed upon the crime is fixed by a subsequent sentence (3). From this it may be seen how reckless it is, and what little obligatory force it has, to impose capital punishment or any other punishment by a sentence passed in default, as a penalty for returning from banishment without leave.

\* *I.e.* person arrested.—TR.

(1) *Merula, Manier van Proced. L. 4, T. 89, C. 1, in not.*

(2) *Ibid. d. l. L. 4, T. 3, C. 2, in not.; Judic. Pract. 4 B. 5 II. § 13, p. 239.*

(3) *Crimin. Stijl, Art. 56, en volg en aldaar de Aanteek van Prof. Voorda.*

## SECTION III.

As soon as a criminal sentence is passed which does Criminal execution. not admit of appeal, execution *immediately* follows (1). This is subject, however, to an exception, namely, when the person sentenced is a pregnant woman, upon whom the sentence cannot be executed until after her confinement (2). Should the execution consist in capital punishment, the condemned person is first prepared for death by ministers of the church (3), and at the present day (and very properly), by such as are of his own religion. Capital punishments are executed in public, as a deterrent to others, by the hangmen who are to be found in some of the towns of this country (4).

If the judge finds, after passing sentence, that it cannot be executed upon the person of the condemned, may he alter it of his own authority? Certainly not; for all sentences once passed are unalterable (5), but he must apply to the Crown for authority to make such alteration (6).

(1) *L. 18, C. de poen.*

(2) *L. 3, ff. de poen. L. 18, ff. de stat. hom.*

(3) *Crimin. Stijl. Art. 47.*

(4) *G. van Hasselt, Dissert. de Carnifice. (Traj. 1773.)*

(5) *L. 14, L. 55, L. 62, ff. de re judic. ; L. 1, § ult. in fin. ff. de quæstion ; L. 1, C. sent. resc. non posse.*

(6) *d. L. 1, de quæst.* The High Court did this in a certain case where a person, condemned to receive lashes, fell into such strong convulsions while the sentence was being read that he was not in a fit condition to suffer the public punishment upon the gibbet. *Resol. Holl. 20 July, 1787, G. P. B. 9 D. fol. 723.* The Committee of Justice at Amsterdam acted somewhat differently in a similar instance in the case of one Hendrik Jansen, who was condemned to suffer the punishment of decapitation by the sword, but as he



## SECTION IV.

Appeal in  
criminal cases,

The general rule with respect to appeals in criminal cases, about which there was such an endless controversy in former days (1), is :

1st. That the High Court may not grant an appeal upon the application of any person who has been prosecuted criminally by extraordinary process and upon confession ; and that such sentences must be carried out without any appeal, *reformatie* or *provocatie*, being allowed from them (2).

The exceptions to this rule may conveniently be reduced to the three following :

*a.* When there is no confession, or no sufficient confession.

*b.* When there is an apparent illegality in the proceedings.

*c.* When the punishment is clearly and conspicuously excessive (3).

2nd. That sentences passed *upon conviction* stand on the same footing as those passed upon confession ;

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rendered the execution impossible by his resistance, he was condemned, by *alteration* of that sentence, to be hanged. B. A. van Houten, *Crimin. Proces tegen H. Jansen*, p. 219, *et seqq.* Although this conduct of the Committee was, in our opinion, quite defensible at law, yet it belongs to those things *quæ non sunt producenda ad consequentiâs*.

(1) V. d. Wall, *Handvesten van Dordrecht*, 2 D. p. 1331, *seqq.* ; Voorda, *Aanteek. op den Crim. Stijl*, Art. 64.

(2) *Resol. Holl.* 10 Sept. 1591, *G. P. B. fol.* 1062 ; Van Alphen, *Papeg.* 1 D. p. 307.

(3) *Berigt van den Hoogen Raad op de Remonstrantie van 't Hof in de zaak van Mr. A. v. d. Mieden*, p. 19, *Judic. Pract.* 2 B. 24 H. § 4, pp. 328 & 329.

and the remedy of appeal, *reformatie*, or any kind of *provocatie* whatever, is not granted to the person condemned (1).

3rd. That the sentences of the lower courts or high tribunals passed in *ordinary process* admit of an appeal to the High Court; and those passed by the High Court, in the first instance, to the National Court of Justice (2).

With regard to the *revisie* (vide *supra*, p. 311) of a criminal sentence passed in an ordinary process, of course all persons condemned may do this at their *own expense*. No *revisie pro Deo* is granted in criminal cases, unless corporal punishment has been inflicted and the condemned person had one-fourth of the votes (of the court) in his favour (3).

(1) *Reglem.* 10 Oct. 1798, *Art.* 16.

(2) *Instr. van. 't Nation. Gerechtshof*, *Art.* 49, *Staatsreg. van* 1805, *Art.* 84.

(3) *Reglem. op. de Revisiën van* 14 March, 1796, *Art.* 2.

## BOOK IV.

### ON COMMERCE AND THE LAWS RELATING THERE TO.

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#### CHAPTER I.

#### ON COMMERCE IN GENERAL, AND THAT OF HOLLAND IN PARTICULAR.

##### SECTION I.

Introduction. "THE whole existence and welfare, as well as the fame of the State of the United Provinces depends upon its shipping, and the trade and commerce which is carried on by it far and wide over the sea." This was once the language of the States General (1). No one will therefore wonder that, although the transactions peculiar to commerce might very easily have been worked into the First Book, where we treated of contracts and other obligations, we have rather chosen to dedicate a special Book of this work to this subject. Two reasons induced us to make this arrangement.

1st. The special importance of the subject which we are now about to treat of did not admit of our touching upon it, as it were, *en passant*, but appeared to us to require a special and separate consideration.

(1) *Plac. Gener.* 8 Feb., 1645, *G. P. B.* 1 D. col. 984. Grotius, *Int.* 3 B. 20 D. § 1, says the same: "the welfare of Holland depends chiefly upon its shipping."

2nd. Although it is a great mistake, in deciding upon so called *mercantile questions*, that the cases are too seldom reduced to those fundamental and simple principles of law, by the proper application of which the most knotty points are often settled with great ease and with perfect certainty (1), yet on the other hand, it cannot be denied that questions relating to commerce ought to be looked at not only from the point of view of a strict lawyer, but also from that of a merchant who has made himself familiar with *mercantile procedure*. All this may be kept in view better by treating this subject separately.

## SECTION II.

The origin of commerce is nearly as old as that of the right of ownership (2). Since that which one person possessed as owner, was often a necessity to another person, there arose the contract of exchange (3), traces of which are to be found even amongst savage nations. The more civilised and populous therefore the nations were, the more numerous were these transactions. The exchanges were often, however, subject to difficulties, when one person did not require the wares of another. Therefore something was substituted for merchandise, which, being brought into use, became an article of universal necessity; and for this purpose the metals were chosen, first in their rude state, and afterwards in pieces of a precise weight, which (to

Origin of  
commerce.

(1) See my *Voorberigt voor Pothier, Verhand. van Contr. en Verbint*, 1 Deel.

(2) Pufendorf, *de J. N. & G. L.* 5, C. 1.

(3) Ibid. *d. l. C.* 5.



prevent falsification) were impressed with a stamp, and called *money*; while the exchange of merchandise for money bore the name of *purchase and sale* (1). This trade was carried on not only by land, but also subsequently by sea with those nations who are separated from us by the seas. The *Egyptians and Phœnicians* were the first nations who practised navigation (2). By this means, commerce was enabled to extend itself over the then known globe. In the oldest histories of the *Indians, Chinese, Persians, Arabians, Ethiopians*, etc., we find mention made of maritime trade (3). The *Carthaginians*, the *Greeks*, and especially the *Rhodians*, were the most distinguished in this respect among the old nations (4). The shipping of the *Romans* appears to have been of little importance before the wars with the Carthaginians, but afterwards it increased as the Roman Empire became more extended (5).

### SECTION III.

Commerce of  
Holland.

Next, the commerce of this country deserves our attention. Its history may be divided into three epochs:

1st. The epoch before and during the reigns of the Counts until the secession from Philip.

2nd. From that secession until the Peace of Westphalia.

3rd. From that Peace until the present time.

(1) Huet, *Histoire du Commerce et de la Navigation des Anciens*, Chaps. 1-6.

(2) Ibid. d. l. Chap. 7.

(3) Ibid. Chaps. 9-14.

(4) Ibid. Chaps. 15-19.

(5) Chap. 21, et suiv.

# SECTION IV.

*First epoch.*—Although the commerce of the *Bata-* The epoch before and under the Counts.  
*vians* was of little consequence, yet it was established at a very early date in the Netherlands (1). Their first branch of commerce and shipping appears to have consisted in fisheries, especially of cod and herring (2). The very salting and curing of the herring was discovered by *Willem Beukelszoon*, a native of the Netherlands, born at *Biervliet* (3). The export of fish, both salted and dried, to other countries, afforded an opportunity for bringing back in the vessels other goods to supply the necessities of this country, which could not itself produce them. This first of all gave opportunities for trade with *the north*, from whence grain and timber could be obtained. Gradually the commerce extended to all countries, and to all kinds of merchandise (4).

The town of *Dordrecht* was at a very early date known as a commercial town (5). At *Amsterdam* there was an established trade before the middle of the sixteenth century (6). Other towns also of this country gradually participated in this foreign trade (7).

The *manufactures* also served to a great extent as subjects for the commerce of this country, to the

(1) Engelberts, *aloude Staat der Nederlanden*, 2 D. p. 38, & 4 D. p. 249.

(2) *Richesse de la Holl.*, T. 1, p. 19, et suiv.

(3) *Beschrijving der Haring-visscher.*, Ams. 1791, in 4to.

(4) *Richesse de la Holl.*, T. 1, p. 23, et suiv.

(5) V. d. Wall, *Handv. van Dordrecht*, 1 D. pp. 56, 83, 108, 132, 140, and elsewhere.

(6) Wagenaar, *Beschr. van Amsterdam*, 9 Stuk, p. 379, et seqq.

(7) *Richesse de la Holl.*, T. 1, p. 36.

manufacturing of which the industrious native of the Netherlands began in many places to apply himself. Cordage, sails, fustage, etc., were no doubt the first of these. Linen and woollen goods, hats and the like, useful for domestic requirements, were also prepared in this country. This chiefly gave rise to the origin of the trade with *England* and *France* (1).

## SECTION V.

To the Peace  
of Westphalia.

*Second epoch*, from the end of the reign of the Counts to the peace concluded in 1648 at *Munster*.—After these provinces became united by the *Union of Utrecht*, and the yoke of the Counts was thrown off, commerce increased more and more; and, whereas it was formerly confined to Europe, it was now also extended to other quarters of the globe. During this epoch, in the year 1602, we meet with the establishment of the *East Indian Company*, and in 1621 with that of the *West Indian Company* (2). The trade in the Mediterranean became of such importance that in the year 1625 a Board of Directors for the trade in the *Levant* was established (3), for the protection of which trade several regulations have since then been made (4). The trade with *Iceland*, the whale fisheries in *Greenland* and the *Davies' Straits*, owe their origin to this epoch (5). The prosperity of Dutch manufactures increased remark-

(1) *Richesse de la Hollande*, T. 1, pp. 39–42.

(2) Wagenaar, *Vaderl. Hist.* 9 Deel, p. 147, et seqq. and 10 D. p. 306.

(3) Ibid. *Beschr. van Amsterdam*, 9 Stuk, pp. 414–419.

(4) *Register op 't G. P. B. Art. Levantschen handel, en Levantvaarders*.

(5) *Richesse, etc.*, T. 1, pp. 67–71.

ably, and embraced entirely new branches of commerce : e.g., the trade in whalebones, sugar-refining, diamond-cutting, etc. (1). A remarkable increase in the trade with *England, France, Spain, Portugal, and Germany*, is shown by the *commercial treaties* entered into during this epoch (2). But the commerce of Holland owes its prosperity to that branch of trade which consists in the transport of merchandise for foreign traders (3).

The establishment of the *Admiralty Boards* in 1591 (4), also deserves to be specially mentioned here. It is no wonder then that during this epoch we meet with the origin of *insurance* (5), the erection of the *Bank at Amsterdam* in 1609 (6), and the conclusion of several treaties with foreign powers (7). So that this epoch was most prosperous for the increase of the commerce of Holland.

## SECTION VI.

*Third epoch*, from the Peace of Westphalia to the present day.—During this epoch also we meet with a further and very considerable increase in the commerce of Holland in the *East Indies* (8), where the Hollanders were masters of *Java*, the *Molucca Islands*, the *Cape of Good Hope*, where they established commercial stations

From that  
Peace to the  
present day.

- (1) *Richesse, etc.*, pp. 71-73.
- (2) *Ibid.* pp. 73-78.
- (3) *Ibid.* pp. 78-80.
- (4) *Instructie voor de Admiraliteits-Raaden en Bedienden van 13 Aug.*, 1597, in 't G. P. B. 2 D. col. 1530.
- (5) *Richesse, etc.*, T. 1, p. 109, *et suiv.*
- (6) *Wagenaar, Besch. van Amsterdam*, 9 *Stuk*, p. 430, *et seqq.*
- (7) *Richesse, etc.*, T. 1, pp. 158-168.
- (8) *Treaty of Peace of Munster of 1648*, Art. 5.



in various places; where they exclusively carried on the trade in spices, their trade was splendid (1). The large and small fisheries were considerably extended (2). The establishment of the Society at *Surinama*, the conquest of that colony, the trade with *Berbice*, *Essequibo*, *Demarara*, *Curacao*, constituted so many branches of the commerce of the Hollanders in the *West Indies* (3). The trade effected upon commission with nearly all the quarters and states of the known world has conferred very considerable advantages upon our trade. And, finally, we may still add another trade, which is not very old, but which in later times became very general and considerable, namely, the dealing in national and foreign funds (4).

## SECTION VII.

Flourish and  
decay of  
commerce.

In this manner flourished, in former days, the commerce of this country. Its advantageous position upon the sea and at the mouth of a large river, and between the northern and southern parts of Europe, of which it forms, as it were, the centre; the necessity of seeking the necessaries of life from other countries, since

(1) *Richesse, etc.*, T. 1, p. 214, *et seqq.*

(2) *Ibid.* pp. 253-279.

(3) *Ibid.* pp. 279-344.

(4) *Ibid.* p. 363, *et seqq.* When these dealings are carried on *bonâ fide*, there is no reason for doing away with them; but when the securities themselves are not really sold, but the dealings are *speculative*, and dependent upon the rise or fall of the funds within the fixed period of a few weeks, they are in our opinion a pest to commerce, and bear so much resemblance to the absurd stock-jobbing of the year of 1720 (*Wagenaar, Vaderl. Hist. 18de Deel*, p. 216, *et seqq.*) that their abolition is just as much to be desired.

the produce of this country consists almost entirely of butter and cheese; the domestic economy of our ancestors, and the satisfaction with a moderate profit; the good faith in fulfilling obligations; the carelessness of most of the nations of *Europe* with regard to commerce, manufactures, and shipping; the immigration of foreign merchants into this country, to enjoy greater religious and civil freedom; the respect paid to the position of a merchant; a wise legislation upon commercial matters, especially with regard to the fixing of import and export duties; an impartial and incorrupt administration of justice; the greater abundance of ready money in Holland than in other countries—these are the chief causes of the greatness of the commerce of Holland (1).

But, just as with nearly all worldly things, when they have reached a certain height they begin to decline (2); such was also the fate of the commerce of Holland. Into what horrible ruin many of our manufactories have fallen! Do we not see several foreign nations providing themselves, by their own ships, with the merchandise that was formerly conveyed by our ships? What are the reasons for this decline? (3). Whereas formerly commerce was considered of little importance by other European nations, now, stirred by jealousy, they use every endeavour to obtain a share in it, and even to oppress the commerce of the Hollanders by heavy duties, in consequence of which

(1) *Richesse, etc.*, T. 1, C. 6 & 7, p. 375, *et suiv.*; Pestel, *Comment. de Republ. Bat.*, T. 1, § 149, pp. 488–490.

(2) C. Zillesen, *Nêrlands Opkomst, Bloei en Welvaart*, p. 88.

(3) *Richesse de la Holl.*, T. 2, C. 8, pp. 1–235; A. Rogge, in his *Verhandeling*, pp. 202–243, which will shortly be quoted.

the commerce of Holland has decreased in the same degree as that of others has increased. The gradual increase of our internal taxation necessarily caused the price of merchandise and the necessaries of life to rise : the wages of workmen had therefore to be raised ; and in those countries in which the raw material was produced manufactories were erected, for which labour could be obtained at much lower wages. The imprudence of the Hollanders in employing foreign sailors, instead of men born in the country, in their shipping, and in engaging foreign workmen in their factories and houses of trade ; the constant wars in which our country was involved, the expenses of a considerable military and naval force, the restraints upon free navigation, necessarily brought about the decline of commerce. Smuggling, which some practised ; the unreasonable duties upon the accounts of foreign correspondents ; the continual falling off in honesty and good faith in trade ; the unlimited credit given to foreigners in dealings upon commission ; the unreasonable luxury and excessive extravagance in the style of living of many merchants ; the frequent and unpunished insolvencies, and the like, by which men deviated from the old Batavian good faith, may be classed under these causes. How much more could we not add with regard to the calamities which our fatherland has suffered within the last ten or twelve years ? and by which it has been reduced to such a low state, that one might apply to it the words of an esteemed writer (1) : “ No nation is happy when some few, abounding in wealth, abandon themselves to luxury, while by far the greater

(1) H. H. van den Heuvel, in his *Verhandeling*, p. 42, which we shall shortly quote.



—nay, the most useful—part of the community suffers from a want of the most common necessities of life. No; true statesmanship is the art of making the people happy as a whole.”

### SECTION VIII.

Of the greatest importance is the question, What <sup>Means of</sup> are the best means of <sup>reviving.</sup> reviving the commerce and shipping of Holland? (1). The means vary according as they relate to the trade of our own country or to the trade in foreign merchandise and shipping; the increase *in our own trade* must certainly be the greatest source of welfare to the other two. In order to make that flourish it is necessary to stimulate agriculture and to derive some advantage from the many uncultivated tracts and waste lands which are still to be found in several departments; to promote the fisheries, which formerly yielded so many millions, in every possible way; to encourage the use of goods manufactured in our

(1) On this point see the *Project for the Improvement of Commerce* by His Majesty William IV., dated the 27th of August, 1751, read at the assembly of the States-General in the *Nederl. Jaarb. of Oct.*, 1751, pp. 894–909. The answers of H. H. van den Heuvel, A. Rogge, and C. Zillesen, given to the question of the *Dutch Society of Science at Haarlem*: “What is the basis of Holland’s commerce, its increase and prosperity? What causes and accidents have hitherto exposed it to changes and decay? What means are best calculated and most readily found for maintaining it in its present state, for promoting its advancement, and for attaining the greatest degree of perfection?” to be found in the 16th volume of the *Transactions of the said Society. Richesse de la Hollande*, T. 2, C. 9, p. 236, et suiv. H. H. van den Heuvel, *Verh. over de noodzakelijkheid van het ondersteunen der gemeene Industrie, en de middelen daar toe dienende, met betrekking tot ons Vaderland* (Utr. 1780). C. Zillesen, *Wijsgeerig onderzoek wegens Neêrlands opkomst, bloei en welvaart* (Amst. 1796).



fatherland both at home and abroad ; to check as much as possible the erection of factories abroad (1).

In order to increase the trade in foreign merchandise and our shipping, specie ought to be kept as much as possible in our own country, and be made to benefit ourselves instead of foreigners ; and for this purpose we ought not to form any foreign companies, nor to pay any foreign accounts, until the goods have actually been sent here, nor to advance or procure any money for the advancement of foreign colonies. The return to economy and good faith, the punishment of bad faith and fraudulent bankruptcies, the promotion of a speedy administration of justice, might do very much to bring about this deserved object. Finally, the restoration of a *lasting peace*, by which a stop may be put to the destructive wars, is absolutely necessary before we may hope for any revival of our decayed commerce and shipping ; and we close this subject with the heartfelt wish that ere long our present *monarchical government* (which, upon the fundamental principles of statesmanship (2), is to be ranked far above the unstable forms of government which for some years back have so horribly unsettled our fatherland) may go hand in hand with the *restoration of peace*, and the *revival of commerce and shipping*.

## SECTION IX.

Trade of  
Amsterdam.

Having now considered commerce in general, we must not pass on without mentioning that of the town

(1) See this more fully treated of in the *Antwoord van V. D. Heuvel*, pp. 54-104.

(2) Montesquieu, *l'Esprit des Loix*, Liv. 5, Ch. 10-12.

of Amsterdam in particular (1). The trade of this town may be divided into *three* kinds.

I. In so far as it consists in the consumption of merchandise manufactured, prepared, brought, and also used in this town. For this purpose there are public markets, both daily and weekly, and at certain fixed periods of the year (2). A number of different market-places (3), and very many guilds of all kinds of crafts and trades (4), which, although not so general and powerful as formerly, are nevertheless supported in so far as their laws and regulations further the advancement of the *sound municipal government* of the town.

II. In so far as it consists in the import and export of merchandise, from other lands to this country and from this country to other lands (5). In order to carry on this inland trade, ferries were established very long ago in this town, and at most of the inland places, i.e., situated on the sea, rivers, or inland waters, over which at fixed periods several vessels pass to and fro (6).

III. In so far as it consists in the sending or exporting of merchandise from or to foreign countries, the origin of the commerce of *Amsterdam* may be fixed at the middle of the fourteenth century. Before the close of that century, and subsequently during the

(1) Compare upon this subject Wagenaar, *Beschr. van Amsterdam*, 9 *Stuk*, and the work of Le Long, *de Koophandel van Amsterdam*; the tenth or last edition of 1801, in four vols. in 8vo.

(2) Wagenaar, *d. l.* pp. 3-11.

(3) *Ibid.* pp. 11-64.

(4) *Ibid.* pp. 64-224.

(5) De Long, 3 *Deel*, 19 *Kap.* pp. 1-46.

(6) Wagenaar, *d. l.* pp. 280-368.

fifteenth and sixteenth centuries, this trade increased to such an extent (1) that this town carried on a trade with all the quarters of the known world (2). For the advancement of this trade there are at Amsterdam :

1st. An *exchange*, or a place of assembly for the merchants who first met there on the 1st of August, 1613 (3).

2nd. Three *weighing machines* to weigh the merchandise sold by weight (4).

3rd. A *bank*, which was erected in 1609 in this town, following the example of other commercial towns in Europe. It became the banker of every person who was willing to intrust his money to it, upon the security of the town. There also money could be changed ; the bank demanding as little profit as possible. The value of all bills of exchange executed here, or drawn upon this place, had to be paid into the bank, provided they were of the value of at least 600 guilders. But the rise in the bank rates afterwards caused many bills to be drawn payable in current money. No one may draw upon the bank for a larger sum than he has in the bank. No one's funds in the bank can be touched by attachment (5). This bank soon obtained so much *credit* that bank money became more valuable than current money ; this was called the *agio* of the bank money. The funds which a person had in the bank were disposed of by way of

(1) Wagenaar, *d. l.* pp. 379-387.

(2) Ibid. pp. 387-425 ; Le Long, 3 *D.* 20-27 *Kap.* & 4 *D.* 28-33 *Kap.*

(3) Ibid. 7 *Stuk*, pp. 89-99 ; Le Long, 1 *D.* pp. 64-68.

(4) Ibid. *d. l.* pp. 144-110 ; Le Long, 1 *D.* 9 *Kap.*

(5) Vide *supra*, p. 290.

*written orders*, by checks or drafts upon the commissioners of the bank, which had to be presented there by the drawer himself or by some one authorised by him (1). There are very many *brokers*, to the number of 500, both Christians and Jews, besides many persons not regularly admitted as brokers, called *Beunhaazen*. They may not deal in the goods of which they are brokers; but only for their principals, to whom they are bound, when called upon, to account for the sales and purchases, both by public auction and by private contract, of all of which they must keep a proper register to serve as evidence in case of any dispute (2). Lastly, there are also in this town various persons engaged in commerce and shipping, and there are, besides the brokers just mentioned, *stevedores*, *convooilopers*,\* forwarding agents or weighers, corn-porters, corn-meters, lightermen, watermen, carriers, sailors on inland and foreign waters, shipwrights, makers of masts, pilots, porters, packers, etc. (3).

## SECTION X.

Before concluding this chapter, we consider it necessary to notice some peculiarities in the carrying on of trade (4). Some special remarks.

(1) Wagenaar, 9 *Stuk*, pp. 530-441; Le Long, 1 *Deel*, 5 *Kap.* pp. 150-219.

(2) Wagenaar, 9 *Stuk*, pp. 188-194; Le Long, 1 *Deel*, 2 *Kap.* pp. 68-115.

\* A *convooibrief* was a parcels ticket, by virtue of which merchandise was transported from one place to another. *Convooilopers* were persons who gave such tickets.—Tr.

(3) Wagenaar, *d. l.* pp. 447-465.

(4) Compare on this point G. T. von Martens, *Gundrisz des Handels-rechts*, 1 *Buch. Abschn.* 1-6.



I. As long as the laws do not impose any limit, commerce—i.e., the trade which is carried on by buying merchandise in order to sell it again at a profit—is open to every member of the state. There is almost no exception to this general liberty in carrying on trade *by wholesale*: i.e., in large quantities, either in weight, measure or number; but in trade *by retail* this liberty is in very many respects *limited* by local laws, in order to check the abuses which are committed by one inhabitant to the prejudice of another (1). It is for this reason that people are forbidden, among other things, to walk about the streets with shop goods for sale, which is usually called *hawking* (2). The vocation of *merchant* is considered so respectable that it is no disgrace even to the nobility (3). It is open to *Jews* as well as *Christians*, to *women* as well as *men*, but, in the case of married women, only so far as they are accustomed to trade as public traders with the knowledge of their husbands (4); and in the case of minors only after they have been tacitly *emancipated*, or have obtained a grant of *venia ætatis* (5).

II. Commerce is carried on by the exchange of merchandise for merchandise, which is usually called *barter*, or by purchase and sale (6). This is entered into *for cash*—i.e., for ready money—or on *credit*. If the

(1) See on this point the local statutes and laws of the guilds in very many towns in this country, which are maintained in full force in so far as they can be considered as laws of sound municipal government.

(2) *Plac. Holl.* 12 April, 1749, *Pub.* 12 Aug., 1802.

(3) *Leyser, Med. ad Pand. T.* 10, *Spec.* 670, *Med.* 22.

(4) *Vide supra*, p. 23.

(5) *Ibid.* p. 32.

(6) *Ibid.* pp. 133–141.

sale has been contracted for ready money, and payment does not follow, the vender may within a short time, *generally six weeks*, claim back the goods sold (1). The payment for goods purchased is made *per cassa*, that is, with cash taken out of the safe of the purchaser; *per banco*, that is, by a draft upon the bank (2); by *bill of exchange*, that is, by endorsing over to the creditor an accepted bill of exchange, who then has the power *either* to endorse it over to some other person, *or* to demand payment from the acceptor upon the day it falls due. If the bill is not paid it is protested, and the holder has his remedy against the acceptor as well as the drawer, and the prior endorsers (3); by *money orders* (*cassiers quitantiën*). The drawer of such an order cannot be sued in default of payment, if payment was not demanded before the expiration of the tenth day. And if the order is signed, not by the person issuing it, but by a third person, payment must be demanded within three days after the receipt or acceptance (4); by *set-off* (*per rescontre*): i.e., by settlement by a counter claim which the debtor has against the creditor (5). A payment on account or in reduction is called *à conto*.

III. Commerce is either *trade upon one's own account*, *upon commission*, or *trade carried on as a forwarding agent*. *Trade upon one's own account* is that which is

(1) Vide *supra*, pp. 49, 140.

(2) Ibid. p. 392.

(3) All this will appear more clearly when we afterwards discuss the *Law of Bills of Exchange* in Chapter VII.

(4) *Keure van Amsterdam van 30 Jan., 1776, in the 2de Vervolg der Handvesten*, p. 83.

(5) This mode of settlement is also called *set-off* or *compensation*. Vide *supra*, pp. 168-170.

carried on for one's own profit or loss. *Trade upon commission* consists in managing the sale or purchase of merchandise, money, or bills of exchange, insurance, etc., upon consideration of a customary *commission*, or of such as may be definitely agreed upon, or of a reward for such management. If the commission agent uses due diligence and care, he is not responsible for the non-payment of goods sold by him, unless he has taken the risk upon himself, which is generally called *del credere*, and for which an additional percentage is paid him. *The trade of a forwarding agent* consists in the forwarding of merchandise between foreign merchants, for which the forwarding agent receives a commission (1).

IV. Commerce is carried on either *by one merchant alone*, or *by several jointly*. The latter is called *partnership*; and we shall state the special laws relating to it in the *next section*.

V. Besides merchants there are still some additional persons necessary for carrying on trade; thus there are *factors*: i.e., persons who have the management of some business matter or trade, and therefore transact it on account of some other person by virtue of a power to that effect (2); *brokers*, who conclude transactions for merchants, and deliver to each of them a proof thereof (3); *book-keepers*, who keep the necessary accounts of everything relating to the business of the house, such as *journals* or *day-books*, the *ledgers* containing the open account, the *invoice-books* relating to the purchase of goods, the *cash-books* containing

(1) Martens, *Grundrissz. des Handels-rechts*, § 18.

(2) *D. D. ad tit. ff. de instit. act.*

(3) Vide *supra*, p. 393.



the daily receipts and payments of cash, etc. (1); *clerks, storekeepers, apprentices, messengers*, and others, according to the extent of the trade (2).

## SECTION XI.

*Societas*, or *partnership*, is a contract by which two or more persons contribute, or bind themselves to contribute, some certain things to a common stock, in order to derive in common by means thereof some honest *profit*, with the mutual obligation of fairly accounting to each other (3). The essential requisites of this contract are—

1st. That each one contributes, or binds himself to contribute, something to the partnership, whether it be money or something else, whether it be his labour or diligence (4).

2nd. That the partnership be entered into for the common benefit of *both* parties: because if only the benefit of one is looked to, it is a contract of *mandates* (5).

3rd. That the parties enter into this contract with the object of deriving some advantage or profit, in which each of the contracting parties may hope to share, in proportion to that which he has contributed to the partnership. The agreement that one only shall enjoy the profit, and the other shall bear the loss, is a *societas leonina*, and is null and void (6).

(1) Compare the authors of the *Italian System of Book-keeping*, as Desaguliers, De Graaf, Strabbe, and others.

(2) *De Koopman*, 1 *Deel*, Nos. 37–40.

(3) Pothier, *Verhandeling van 't Regt. omtrent Sociëteiten*, of *Compagnieschappen*, 1 *H.* § 1.

(4) *Ibid.* *d. l.* § 7.

(5) *Ibid.* § 8.

(6) *L.* 17, § 2, *ff. pro socio.*; Pothier, *d. l.* § 9.



4th. The object of the Partnership, and for which the contracting parties join in common, must be a lawful one, and the profit which they expect to derive must be an honest gain (1).

Profit and loss. Inasmuch as the contract of partnership is an equitable one, the share of each in the profits ought to be proportioned to the value of that which he has contributed to the partnership. This is subject to exceptions—

1st. In case of a special agreement by which a party who has contributed less is benefited by being allowed to share equally in the profit.

2nd. When a larger share in the profits is compensated for by something else by which the partner benefits the partnership: e.g., if he has a special knowledge of the business (2). Each of the partners ought to bear the same share of the loss which the partnership may suffer, as he is entitled to draw from the profits in case the partnership succeeds; unless the labour and diligence contributed should render it just that he should bear a smaller portion of the loss or none at all (3).

If it appears that a contract of partnership has only been entered into in outward appearance, while a loan of money upon interest lies hidden at the bottom of it, it must be declared null and void, and everything which the so-called partner has received to make up his share of the profits of the so-called partnership must be charged against the principal sum which he has contributed and in diminution thereof (4).

(1) *L. 1, § 14, ff. de tut. & rat. distrak.*; *L. 35, § 2, ff. de contr. empt.*

(2) Pothier, *d. l.* §§ 11-14.

(3) *L. 20, § 1, ff. pro socio.*; Pothier, *d. l.* § 15.

(4) Pothier, *d. l.* §§ 16, 17.

## SECTION XII.

Partnerships are *either* general or special: general partnerships may again be divided into two kinds, *either* a partnership of all the goods (of the partners), or of all the profits derived. Different kinds of partnerships and conditions.

The *partnership of all goods* (1) is that by which the contracting parties agree to contribute all their property, present and future, as a common stock. No one is presumed to have intended to enter into this kind of partnership unless it is positively so expressed (2). It may be entered into between persons, one of whom is much richer than the other (3). All the property held by each of the partners at the time the contract is entered into becomes common from that moment, without any necessity for delivery (4). This partnership comprises everything that each partner acquires, under whatsoever title, even under that of inheritance, gift or legacy (5). And nothing is excepted from it except that which is acquired by one partner under the express condition that it should be excluded from the partnership, or that which he may acquire by criminal or dishonest means (6). Such a partnership is responsible for all the debts of each partner due at the time the contract was entered into, as well as for those which each was compelled to incur

(1) *Societas universorum bonorum*. See on this Pothier, *l. l.*  
2 H. §§ 3-6.

(2) *L. 7, ff. pro soc.*

(3) *L. 5, § 1, § eod.*

(4) *L. 1, § 1, L. 2, L. 3, ff. eod.*

(5) *L. 3, § 1, L. 52, § 16, ff. eod.*

(6) *L. 53, L. 54, ff. eod.*

during the partnership, on account of himself, and also on account of his children and household (1). But this must not be extended to foolish expenses, losses at play, debauchery, fines or penalties paid or forfeited by one of the partners on account of a crime (2).

The *partnership of general profits* (3), is that by which the parties enter into a community of everything they may acquire during the existence of the partnership, from any kind of trade whatsoever (4). This partnership is however confined to *profits* only, and does not comprise therefore what one partner acquires by inheritance, gift or legacy (5). Nor is it responsible for debts which the partners were bound to pay to third persons, or which were incurred during the partnership on account of matters not connected with the partnership (6).

The *special partnerships* are :

1st. Those entered into for the purpose of holding certain particular things in common, and of sharing the fruits thereof (7).

2nd. Partnerships for carrying on in common some particular handicraft or trade (8).

3rd. Partnerships for carrying on any particular commerce.

By this is understood :

(1) *L.* 73, *ff. eod.*

(2) *L.* 52, § 18, *L.* 55, *L.* 56, *L.* 59, § 1, *ff. eod.*

(3) *Societas universorum, quæ ex quæstu veniunt.* See Pothier, *d. l.* § 7.

(4) *L.* 7, *L.* 13, *L.* 52, § 8, *ff. pro soc.*

(5) *L.* 9, *L.* 10, *L.* 11, *L.* 71, § 1, *ff. eod.*

(6) *L.* 12, *ff. eod.*

(7) *L.* 5, *ff. eod.* Pothier, *d. l.* § 8.

(8) Pothier, *d. l.* § 9.

*a.* The partnership entered into by two or more merchants, for carrying on some trade in the name of all the partners in common: e.g., in the name of *N. N. & Company*. This is called the *firm* of the partnership.

*b.* The partnership called *en commendite*: i.e., the partnership which a merchant enters into with some particular person, for the purposes of a trade which is to be carried on in the sole name of the merchant, and to which the other party only contributes a certain sum of money, in order to assist in making up the capital of the partnership, upon condition that he shall draw a certain share of the profits, and shall bear a certain share in the losses.

*c.* The *anonymous partnership*: i.e., where two or more persons agree to share in a certain business, which shall be transacted by one of them in his own name (1).

The contracts of a partnership are often qualified by special conditions: e.g., as to the time at which the partnership shall commence, and for which it shall continue; as to the power of each partner in the management of the affairs of the partnership; as to the shares of each in the profits and losses; as to securing an indemnity to a partner who, although all are partners in equal shares, has nevertheless contributed more to the partnership than the others (2).

### SECTION XIII.

A concluded partnership gives the partners various rights, and imposes various duties upon them, both Rights and obligations of partners.

(1) Pothier, *d. l.* § 10; Martens, *Grundrisz. des Handels-rechts*, §§ 21-23.

(2) *Ibid. d. l.* 3 *H. pp.* 54-68.



mutually with regard to each other, and with regard to third persons. Under this head the following points may be included:—

1st. Each partner may use the property of the partnership for the object for which it is intended (1).

2nd. Each partner must share in the expenses necessary for preserving the property belonging to the partnership (2).

3rd. One partner cannot make any alteration or repairs in and about immovable property belonging to the partnership without the knowledge and consent of his co-partners (3).

4th. One partner cannot alienate or pledge the property belonging to the partnership, except for the share which he holds in the partnership (4).

5th. One partner may admit a third person into the partnership *as to his share*, but not as a partner of the whole partnership (5).

6th. In partnerships carrying on trade as a *firm* each partner is liable *for the whole* of the debts of the partnership (6): provided these debts have been incurred by a person who had authority to bind all the partners, and provided they were incurred in the name of the partnership (7).

7th. A partner *en commendite*, and a person who has

(1) Pothier, *d. l. 5 H.* § 1.

(2) *L. 12, ff. comm. div.*; Pothier, *d. l. § 2.*

(3) *L. 28, ff. comm. div. L. 11, ff. si serv. vind.*; Pothier, *d. l. § 3.*

(4) *L. 68, ff. pro soc.*; Pothier, *d. l. § 4.*

(5) *L. 47, § fin. ff. de Reg. Jur. L. 20, L. 21, L. 22, L. 23, ff. pro soc.*; Pothier, *d. l. § 5.*

(6) Pothier, *d. l. 6 H.* § 2, and *de Aanmerk.* pp. 235-237.

(7) *Ibid. d. l. §§ 3 & 4.*

a share in an *anonymous partnership*, is liable to his partner, but not to third persons (1).

8th. Each partner is bound to his co-partners to account to the partnership for all that he is indebted to it, after deducting that which the partnership owes him. This liability to account has reference to that which each partner has promised by the contract to contribute, in so far as he has not yet contributed it; to that which each has drawn out of the common funds for his private affairs; to making good all damage occasioned by his negligence to the property or business of the partnership (2).

9th. Each partner is bound, in proportion to his share in the partnership, to satisfy the claims of his co-partners upon the partnership, after deducting that which these co-partners themselves owe to the partnership (3).

From the obligations of this transaction \* arises a *personal action*, which lies for each partner and his heirs against his co-partners and their heirs, for the performance of all those obligations which result from the nature of the transaction, or the special agreements in the contract (4).

#### SECTION XIV.

All partnerships are extinguished—

1st. By effluxion of the time for which they were entered into.

How partnership is dissolved.

(1) Pothier, *d. l.* § 5.

(2) Ibid. *d. l.* 7 H. §§ 1-5.

(3) Ibid. *d. l.* § 6.

\* I.e. contract of partnership.—Tr.

(4) This is called *actio pro socio*. Voet, *ad tit. ff. pro soc. n.* 9, *seqq.*

2nd. By the destruction of the subject matter or the completion of the business which constituted the object of the partnership.

3rd. By the death or bankruptcy of one of the partners. Death, however, does not extinguish a partnership if it has been agreed that the partnership shall pass over to the heir (1).

4th. By a wish to retire from the partnership, provided this withdrawal takes place in good faith, and not at an inconvenient time (2).

The effect of the dissolution of a partnership is that for the future all contracts entered into by each of the former partners are for his own account, at any rate in so far as they are not a necessary consequence of the business of the partnership (3). The partners are entitled to demand from each other the liquidation, and a general account and distribution, of the affairs of the partnership; for this purpose an *account* must first be drawn up of that which each owes to, and is entitled to claim from, the common concern, the one being set off against the other. After that a *statement* must be drawn out of everything belonging to the common concern, in which must be included the balance for which each appears by the account to be creditor of the common concern, and which, upon distribution, must first be paid to them. Everything is valued in this statement. Then the distribution commences, which is decided by drawing lots, the

(1) Our modern law differs from the Roman law in this respect. Bynkershoek, *Quæst. Jur. priv. L. 3, C. 10, p. 450, vs. Noli objicere, etc.*

(2) Pothier, *d. l. 8 H.*

(3) *L. 40, L. 65, § 10, ff. pro soc.; Pothier, d. l. 9 H. § 1.*

person who draws the greater lot being compelled to pay the person who draws the smaller lot. Sometimes the distribution is made by selling to the highest bidder amongst themselves. The debts which are considered good debts (*solide*) are included in the drawing by lots. Bad or doubtful (*dubieuse*) debts are collected, and an account rendered of the money received. The expenses of the distribution are borne in common (1).

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## CHAPTER II.

### GENERAL VIEW OF THE MARITIME LAW OF HOLLAND.

#### SECTION I.

SINCE, according to the universal law of nature and of nations, no person has become, and in the nature of things cannot become, the special owner of the sea, it follows that the navigation of the sea is open to every one, and that all obstructions placed against it are a violation of the natural rights of man (2).

After the land was taken possession of by virtue of occupation, a certain *territorial* right over the sea

Freedom of  
navigation.

(1) Pothier, *d. l.* §§ 2-6.

(2) D. A. Azuni, *le Droit maritime de l'Europe*, T. 1, C. 1, Art. 1, pp. 1-11. The controversy between *H. Grotius* and *J. Seldenus* in the commencement of the 17th century, with regard to the dominion over the sea, is well known. The former, in his treatise, *Mare liberum sive de jure, quod Batavis competit ad Indiana commercia*, to be found at the end of several editions of his *Jus Belli et Pacis*. The other, in his treatise, *Mare clausum, sive de dominio maris* (Lond. 1635).



washing the shore was introduced (1). Hence the legality of the rule that only the inhabitants of the land adjoining the sea are entitled to fish out the productions of the sea thus washing the shore: e.g., corals, pearls, amber, etc. (2). Hence also foreign ships are forbidden to use the shores and harbours of the country except under certain limitations (3); and hence it is also that an entire fleet of a foreign nation may not enter a harbour, but only a limited number of ships (4).

This territorial right, therefore, has reference chiefly to the sea-coasts, harbours, straits, bays, etc., in order to regulate in those places the free arrival and entry of ships (5); and also to the imposition of import and export duties upon merchandise, and to the framing of regulations with regard to the fisheries (6).

There is also no doubt that when war breaks out between two nations the trade between them is interrupted, and ceases while the war lasts. The equipment on both sides of *privateers* and *vessels under letters of marque*, and the capture of *prizes* by these vessels, is a clear consequence thereof (7). These vessels, however, must be provided with a proper commission from the sovereign, or they are deemed to be rovers and pirates (8).

(1) Bynkershoek, *de Dominio maris*, C. 2.

(2) Grotius, *de J. B. & P. L.* 2, C. 3, § 8; Azuni, *d. l. Art.* 2, § 3, p. 14.

(3) Azuni, *d. l.* §§ 4-6.

(4) *Ibid.* *d. l.* § 7.

(5) *Ibid.* *d. l.* C. 2, *Art.* 1-5, p. 62, *et seqq.*

(6) *Ibid.* *Art.* 8, p. 91, *et seqq.*

(7) *Ibid.* J. 2, C. 4, p. 246, *et seqq.*

(8) Bynkershoek, *Quæst. Jur. Pub.* L. 1, C. 17 & 18.

## SECTION II.

Much more difficult and intricate is the question: <sup>Navigation of neutral nations.</sup> What are the rules of law with regard to the carrying on of trade by *neutral* nations, who are not at war with each other? (1). In order to answer this question, it is first of all necessary to define what is meant by *neutrality*. Neutrality consists in *abstaining from all such acts as have a direct relation to the war, or from evincing a disposition to render assistance and to join in it* (2). Neutrality being thus defined, the answer to the question becomes easier, upon the principles of the universal law of nations. The fact that we carry on trade with a nation which is at peace with us, but with which another power is at war, does not give that belligerent power any right to obstruct us in this trade (3), even although this trade consists in the exportation of arms, gunpowder, timber, and similar articles of commerce (4). But it is a *violation of neutrality* when, e.g., one voluntarily takes part in a naval engagement and renders assistance to one or

(1) From among the numerous authors who have treated upon this subject, and who may be found in *L. Holst, Versuch einer kritischen uebersicht der Volker-Seerechte* (Hamb. 1802), we content ourselves with referring the reader to Bynkershoek, *Quæst. Jur. Publ. L. 1, C. 9-14*; A. Ploos van Amstel, *Diss. de Jure commercii, quod Gentibus, in bello mediis, competit.* (L. B. 1759); Azuni, *le Droit maritime de l'Europe, T. 2*; Lampredi, *du Commerce des neutres en tems de guerre, traduit par F. Peuchet* (Paris, 1802); F. J. Jacobsen, *Handbuch ueber das Practische Seerecht Engländer und Franzosen, 2 Bande* (Hamb. 1803).

(2) Azuni, *d. l. C. 1, Art. 2, p. 12, et seqq.*

(3) Ibid. *d. l. C. 4, Art. 1, p. 50, et seqq.*

(4) S. de Coccej, *Dissert. Proæm. in Grotium de J. B. & P.* 789, p. 619.

other of the combatants ; when a neutral vessel acts as a spy against a belligerent power ; when a neutral vessel tries to run the blockade of a harbour without the consent of those blockading it (1) ; when a vessel is not provided with the necessary papers to prove that she belongs to a neutral nation (2). Upon the same principles it ought to be established that, according to the universal law of nations, a neutral ship with a cargo of merchandise belonging to the enemy may not be captured, but that the rule, "*free ships, free goods*," should be followed ; so also, *vice versâ*, neutral goods in an enemy's ship should not be subject to capture and forfeited together with the ship (3).

Since, however, the carrying on of trade by a neutral nation with a power with whom we are at war has this tendency, that the latter is thereby enabled to continue the war, especially when it is supplied with arms, ship timber, etc., this general freedom of trade has been limited and restricted by a number of *treaties* and *conventions* entered into between various nations (4), as these treaties and conventions defined by mutual consent what kind of goods the neutral nation might supply to the belligerents (5) ; how neutral ships with enemies' goods on board, and neutral goods in enemies' ships were to be dealt with, and to what places navigation was to be free.

(1) Azuni, *d. l. Art. 2 & 3*, pp. 60-96.

(2) Lampredi, *traduit par Peuchet, d. l. p. 163*.

(3) Azuni, *d. l. Chap. 3*.

(4) *Ibid. d. l. Chap. 2, Art. 4, p. 96, et seqq.*

(5) *Ibid. d. l. Art. 5, p. 141, et seqq.* ; Lampredi, *d. l. Part 2, p. 199, et seqq.*



SECTION III.

This limitation by means of treaties and conventions has in many respects regulated the rules upon this subject for the commerce of Holland. In the oldest treaties one only finds the general condition that no assistance whatever shall be rendered to the enemies of either parties (1). The rule then in force was "*Wherever I find you, I seize you,*" and for this reason it was not allowed to ship enemies' goods in a neutral vessel. Afterwards the maxim "Free ship, free goods; enemy's ship, enemy's goods," was accepted as a universal rule. This afforded an opportunity for enumerating more specifically in the treaties what were *contraband* goods. Most remarkable in this respect is the agreement made between the *States-General* and *Great Britain* in 1674 (2), by which all kinds of weapons, soldiers, horses and their accoutrements, and all kinds of instruments of war were included amongst contraband goods; while blankets, woollens, linens, silk or cotton manufactures, clothes, gold, silver and other metal, coals, grain, tobacco, meat, fish, and all kinds of provisions, were considered as not contraband; so also cotton, hemp, flax and pitch, cables, sails, anchors, masts, planks, deals, beams and every kind of material for building and repairing ships. The same or similar provisions may also be found in treaties concluded between this State and

Law of  
Holland on  
this point.

(1) Treaty between the King of Sweden and the States-General, 5 April, 1614, Art. 5, *G. P. B.* 4 D. p. 276.

(2) Maritime treaty between Charles II., King of England, and the States-General, 1 December, 1674, Art. 2, 3, 4 & 8, *G. P. B.* 3 D. p. 352.



various foreign powers: e.g., with *Sweden*, in 1679 (1); with *Denmark*, in 1701 (2); with *Sicily*, in 1753 (3); with the *United States of America*, in 1782 (4); and others.

From a comparison of these treaties the following rules may be deduced:

1st. That all goods which are directly used in war are contraband.

2nd. That materials for shipbuilding are not contraband according to most of these treaties and contraband according to a few, and sometimes they are tacitly passed over.

3rd. That provisions are generally considered not to be contraband.

#### SECTION IV.

Maritime law  
of Holland.

The oldest maritime law of which we find mention made in this country are the *Water-laws passed by Count Floris IV. in 1223 at Westkappel in Zeeland* (5).

In the year 1475, the towns of *Amsterdam*, *Hoorn*, *Enkhuizen*, *Monnikendam*, and *Edam* passed a *Maritime Ordinance* (6), which appears to be the oldest in *Holland*. But the provisions upon the maritime law of Holland are found chiefly in the *Ordinance of the Emperor Charles V. of the 19th July, 1551* (7), and the

(1) *G. P. B.* 3 *D.* p. 1394.

(2) *G. P. B.* 5 *D.* p. 397.

(3) *G. P. B.* 8 *D.* p. 261.

(4) Le Long, *Koophandel van Amsterdam*, 4 *D.* p. 220.

(5) S. van Leeuwen, *Batav. illustr.* pp. 137-142.

(6) Commelin, *Beschr. van Amsterdam*, 2 *D.* 6 *B.* pp. 915, 916.

There is another very old *Ordonnantie van het Schipregt*, to be found in Wagenaar, *Beschr. van Amsterdam*, 9de *Stuk*, *Bijl. A* p. 466.

(7) *G. P. B.* 1 *D.* p. 783.

*Supplementary Ordinance of King Philip, of the 31st October, 1563* (1). In default of these, recourse is sometimes had to the *written or Roman law* (2), and the *maritime law of Wisbuij* (3), and the like.

*Placaats* have also been promulgated from time to time upon various points relating to the maritime law (4); the principal commercial towns have also enacted *local statutes* (5), upon average, insurances, etc., which are accordingly followed.

## SECTION V.

Among the special laws relating to commerce and shipping, and prevailing in this country, the *staple-right* specially granted to the town of *Dordrecht* (6), though allowed also to some other places (7), should not be forgotten. By this is meant “a privilege granted by the lord of the land to the inhabitants of a

(1) *G. P. B.* 1 *D.* p. 796. This *placaat*, with very fine notes, has been published by T. van Glins (*Amst.* 1665, in 4to.).

(2) See P. Peckii *Commentarii ad rem nauticam, cum notis.* A. Vinnii (*Amst.* 1668).

(3) A. Verwer, *Nederl. Zeerechten*, pp. 1-52; P. le Clercq, *Lichaam van de Zeerechten*, pp. 126-188.

(4) To be found in the *Gr. Plac. Boek*, and in the *Receuil van Zeezaken*.

(5) These are enumerated by Prof. v. d. Keessel, *Thes.* 685 & 711. A new *Ordinance upon the Maritime Law*, for the use of this country in general, and in which all the scattered laws are collected in proper order, would not be unserviceable. Azuni, *le Droit maritime de l'Europe*, T. 1, p. 263.

(6) This was first established in that town in 1299. See Van de Wall, *Handvesten van Dordrecht*, 1 *D.* p. 100.

(7) As at *Naarden*; see Mieris, *Chart. Boek*, 2 *D.* pp. 656 & 826, at *Enchuizen*; see the *Handvesten dier Stad*, pp. 93 & 94, at *Middleburg*; see *Boxhorn, Chron. van Zeeland*. 1 *D.* p. 140.

town or place, or compelling the masters or merchants sailing by to unload their cargo and to bring it into the town to market, or to pay certain duties in lieu thereof" (1).

Some towns obtained a release from this obligation, others made conventions with respect to it. Very many disputes and lawsuits have arisen out of it, but the decisions, however, have generally confirmed the staple-right; amongst others, in the years 1540 and 1541, when the staple-right was settled and defined in many respects (2). As late as the year 1703 an agreement upon this point was made between the towns of *Dordrecht* and *Middleburg* (3); in the year 1719, with the *East India Company* (4); in the year 1713, with the *town of Nymegen* (5); nay, even in the year 1763 with the *Committee of the States-General* with regard to claiming the staple-right from ships or boats laden with rice grown upon alluvial soil belonging to the Crown (6).

## SECTION VI.

Export and  
import duties.

The carrying on of foreign trade, both by exporting and importing goods and merchandise, is subject to various duties. The principal of these are the following:—

(1) Van de Wall, *d. l. p.* 103.

(2) On all these points compare N. Lobedanius, *Diss. de Jure Stapulæ* (Traj. 1757), and especially Van de Wall, *Handv. van Dordrecht*, to be found in several places in the *Index*, under *Stapel*, *Stapelregt*, *Stapelvrijheid*.

(3) *G. P. B.* 5 *D. p.* 748, and Van de Wall, *d. l. p.* 1950.

(4) Van de Wall, *d. l. pp.* 1963–68.

(5) *Ibid. d. l. p.* 1977.

(6) *Ibid. d. l. pp.* 2034–39.

I. *Direct export and import duties (convooyen and licenten).* Without entering upon what took place before the year 1725, the *Placaat of the States-General of the 31st July, 1725*, and the annexed *tariff of the revenue from imported goods and merchandise*, may conveniently be taken as the basis (1). By these *Placaats* it is enacted—

1st. That government duty, according to this tariff, must be paid upon all goods, wares and merchandise, imported or exported, by sea and waters, by the rivers and over land (2).

2nd. Some goods, however, are exempt from these duties: e.g., goods which are delivered to the magazines of the government, or to government ships of war, East Indian wares, goods exported to Surinam, etc. (3).

3rd. How to proceed in passing entries of goods and obtaining passports and dock warrants, before the goods can be shipped or cleared (4).

4th. What forfeiture and fines are inflicted upon not passing entries of, upon concealing or passing false entries of, goods (5).

5th. How to proceed with the shipping of exported goods and the clearing of imported goods, after the necessary passports or dock warrants have been obtained (6).

6th. Special regulations as to the payment of these

(1) *G. P. B.* 6 D. pp. 1338-78.

(2) *Plac.* 31 July, 1725, *Art.* 1-6.

(3) *Ibid.* *Art.* 7-25.

(4) *Ibid.* *Art.* 26-42.

(5) *Ibid.* *Art.* 43-54.

(6) *Ibid.* *Art.* 55-79.



duties upon the exportation of goods, at the place where they are first loaded or shipped (1).

7th. So also upon the importation of goods at the place of discharge, whether the goods have come by sea, by river, or over land (2).

8th. Regulations to be observed in the clearing, unloading, or transporting of goods (3).

9th. Mode of obtaining an inland passport for goods which are conveyed by order of the government from one place to another (4); the ordinary market and ferry boats are exempt, however, from this: also persons who transport small articles for consumption; and in certain cases the inhabitants in the country lands belonging to the States-General (5).

10th. Finally, these regulations are concluded with the necessary regulations as to the mode of suing persons who transgress this placat, and also as to the duties of custom-house officers, tide-waiters, etc. (6).

Subsequent alterations have been made in the above-mentioned *tariff* in general respects, which may be gathered from the *proclamations* and *resolutions* upon this subject (7).

As it is not convenient for many merchants to look after all these matters themselves, or to have them attended to by their clerks, they employ certain

(1) *Plac.* 31 July, 1725, *Art.* 80-104.

(2) *Ibid.* *Art.* 105-133.

(3) *Ibid.* *Art.* 134-149.

(4) *Ibid.* *Art.* 150-159.

(5) *Ibid.* *Art.* 160-188.

(6) *Ibid.* *Art.* 202, *et seqq.*

(7) *The improved and supplemented tariff*, to be found in Le Long's *Kooph. van Amsterdam*, 4 D. p. 229, *et seqq.*, is also very useful.

persons called *convooij-loopers* for this purpose, who clear vessels, loading or discharging, at the custom-house, and procure the warrants of clearance or shipment of the goods (1). They have a *preferent* claim upon the estates of insolvent merchants for disbursements made for import duties and taxes, for direct export and import duties, and also for tonnage and *ad valorem* duties, but not for a longer period than *one* month after the disbursements have been made (2); but this period was afterwards extended to *three months* (3).

II. *Tonnage and ad valorem duties.* By virtue of the above-mentioned Placaat of the 31st July, 1725, a duty of five *stivers* for every two tons must be paid upon the tonnage of every vessel departing from this country, and a duty of ten *stivers* for every two tons upon every vessel arriving from foreign countries; upon payment of which the vessels are exempt for twelve months. The vessels have to be surveyed for this purpose by sworn surveyors (4), who give a *certificate* of their *survey*. This certificate only lasts for two years. The payment of the tonnage is endorsed upon the certificate. The vessels belonging to the East and West Indian Companies, and the Colony of Surinam and those employed in the large and small fisheries, are exempt from this tonnage; also those

(1) Wagenaar, *Beschr. van Amsterdam*, 9 *Stuk*, p. 436.

(2) *Publ. Holl.* 28 *April*, 1764, *G. P. B.* 9 *D.* p. 1244.

(3) *Publ. Holl.* 5 *April*, 1786, *G. P. B.* 9 *D.* p. 559.

(4) Similarly all ships or vessels sailing upon inland waters must be surveyed in order that the *inland tonnage, water, pleasure, and passage duties* may be levied upon them according to their size. *Ordonn. op dat middel*, van 26 *Nov.*, 1805.

who run into port through distress or for the purpose of wintering (1).

The *ad valorem* duty, as it was fixed in the year 1725 until further notice, consists in the payment of *one-half per cent.* upon all exported, and *one per cent.* upon all imported goods, wares, and merchandise (2). It remained thus until the year 1760, when the extraordinary *ad valorem* duty was doubled for the period of one year, by one per cent. upon imported, and one-half per cent. upon exported goods (3), which has been annually renewed by subsequent proclamation (4).

III. *Duties upon foreign produce.* At the commencement of the year 1806 this tax was levied upon all goods imported into this country from abroad, irrespective of the ordinary direct export and import duties. The nature of this tax and the mode of levying it are regulated by a special *Ordinance* (5). A special *Ordinance* was passed upon *foreign brandy and distilled spirits* (6).

IV. *Lighthouse and beacon dues.* Lighthouses and beacons have been erected at various places for the benefit of ships at sea, as at *Egmond-on-the-Sea, Scheveningen, Huisduinen, Vlieland, Terschelling, Urk,* etc. In order to pay the expenses of maintaining these fires and of supporting the light-boats, coal

(1) *Plac.* 31 July, 1725, *Art.* 189-201.

(2) *Plac.* 6 June, 1702, *G. P. B.* 5 D. p. 303; *Lijst van* 31 July, 1725, *in fin.* *Art.* 8-11.

(3) *Publ. Gen.* 4 Feb., 1760, *in the Nederl. Jaarb. van* 1760, p. 85.

(4) *Nederl. Jaarb. van* 1761, p. 87; & 1779, p. 90.

(5) *Ordonn.* 18 Dec., 1805.

(6) *Ordonn.* 24 Dec., 1805.

warehouses and lanterns, a duty was imposed in the year 1668 upon all vessels, entering or leaving the harbours of Texel the Vlie, and Terschelling, of a certain number of *stivers* for every two tons, according to the size and nature of the vessels, which duty was regulated by a tariff issued at the same time (1). In the year 1762 the lighthouse dues were temporarily raised for three years by one-third, and it was further ordered that the lights should be lit during the three summer months, and that ships that had once paid lighthouse dues should not be bound to pay them again, if they were compelled again to run into port by stress of weather; and this order was from time to time renewed (2).

## SECTION VII.

In order to sail the seas with greater safety, especially in the neighbourhood of lands where, through ignorance of the depth of the water, one is very liable to be stranded on a sand-bank, the aid of pilots is made use of. A master is liable, in all places where it is necessary or customary to take a pilot, to a fine of fifty gold reals, over and above the liability to make good the costs, damages and interest, which the merchant may suffer (3) in case no pilot is taken. A pilot, whilst employed, is fed at the expense of the master, and paid at the expense of the merchant; unless his pay amounts to more than six

(1) *Ordonn.* 19 Dec. 1668, *G. P. B.* 3 D. p. 1303.

(2) *Public.* 28 Julij, 1762, *G. P. B.* 9 D. p. 1251; *Nederl. Jaarb.* 1762, p. 471; 1765, p. 451; 1771, p. 838; & 1777, p. 813.

(3) *Plac. van Kon. Philips van* 1563, Art. 9; *De Groot, Intro.* 3 B. 20 D. § 10.



gross Flemish pounds, in which case it is a subject of general average (1). Several ordinances have been passed for regulating the qualifications, duties and pay of pilots: thus in 1661, for the pilots of the *Maas* and *Georeesche Gat* (2); in 1698 for those of *Huisduinen*, *Helder*, *Petten*, *Calants-oog*, *Texel*, and other places in that neighbourhood (3); at the same time for the pilots of *Vlieland* and *Terschelling* (4); in 1702 for those of the *Stryensche Sas* (5); in 1764 for those of *Willemstad* (6); and finally, in 1773, a local statute was passed by the Lower Court of the town of *Amsterdam* with regard to the piloting of ships, both to *Texel* and to the *Vlie* (7).

The principal provisions of these laws consist chiefly of the following. The pilots must first be examined, admitted by a certificate, receive the badge and number of a pilot, and be sworn (8). Those who are not admitted are liable to a fine of twenty-four guilders (9). They must be able-bodied men, more than twenty-five and less than sixty years old, well acquainted with harbours and rivers (10). They must always

(1) *Plac.* 1563, *d. Art.* 9; *De Groot, Intro.* 3 *B.* 29 *D.* § 15.

(2) *Ordonn. Holl.* 1 *Oct.* 1661, *G. P. B.* 2 *D.* *col.* 2691.

(3) *Ordonn. Holl.* 24 *Oct.* 1698, *G. P. B.* 4 *D.* *p.* 1307.

(4) *G. P. B.* 4 *D.* *p.* 1316.

(5) *Ordonn. van de Raaden en Rekenmeesters van Zinje Koninglijke Majesteit van Groot-Brittanniën, als Heer van Niervaart*, 9 *Jan.* 1702, *G. P. B.* 5 *D.* *p.* 929.

(6) *Ordonn. van gemelde Raaden en Rekenmeesters*, 9 *Juni* 1746, *G. P. B.* 7 *D.* *p.* 1554.

(7) *Keure* 29 *Jan.* 1773, in the 2de *Vervolg der Handv. van Amsterdam*, *p.* 223.

(8) *Ordonn.* 1698, *Art.* 1.

(9) *Ibid.* *Art.* 6 & 30.

(10) *Ibid.* *Art.* 2.

be provided with their pilot's badge, which upon their death must be returned by their widows or heirs (1), and may not be pawned, drunk or squandered away (2). They must always show these badges to the master before piloting a ship in or out of port (3). Every pilot boat must carry a white flag at the mast-head, upon which, or upon the main sail, the number must clearly appear (4). They must pilot inward-bound ships through the shallows; unless the master wishes to be piloted further up, which they cannot refuse to do upon tender of a reasonable sum (5). They are bound to board vessels one mile outside the shallows (6). They must sound the mouths of the harbours from time to time, and watch the shifting of the sand-banks, promontories, and mouths, and the drifting of buoys (7). The pay of pilots is regulated according to the number of feet the vessel draws, to its size, and according as it is the summer or winter season (8). If a pilot runs a ship aground through wilfulness, by accident, through carelessness or bad reckoning, he is punished with suspension of his certificate, removal, banishment, corporal punishment, or even death, according to aggravating or mitigating circumstances, aggravated or mitigated (9). Pilots, on board a ship for the purpose of piloting her in

(1) *Ordonn.* 1698, *Art.* 4.

(2) *Ibid.* *Art.* 5.

(3) *Ibid.* *Art.* 6.

(4) *Ibid.* *Art.* 40.

(5) *Ibid.* *Art.* 7.

(6) *Ibid.* *Art.* 8.

(7) *Ibid.* *Art.* 10.

(8) *Ibid.* *Art.* 9, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, *etc.* *Keur van Amsterdam van* 29 Jan. 1773.

(9) *Ibid.* *Art.* 11.

or out, who neglect to take soundings or to heave the lead, are liable to a fine of twenty-five guilders, whether any accident happens in consequence or not (1).

## SECTION VIII.

## Shipwreck.

As humanity demands that every possible assistance should be rendered to ships in danger off the coasts or harbours, and that it should be responsible for the plundering of these unfortunates, the laws of Holland have provided for these cases (2). Although wrecked goods have been considered since the most ancient times to belong to the domains of the Counts, yet a remarkable relaxation in this respect was introduced under the government of the later Counts, in order to protect the rights of owners of stranded goods and to prevent wrecking (3). In proof of this may be instanced: the privileges granted by the Counts to particular individuals or colleges for that purpose (4); various conventions upon this subject with foreign nations (5); and a number of *placaats* published both by the Emperor CHARLES and King PHILIP, and afterwards by the *States* themselves (6). By all of these the right of the owners to claim back their goods found in the sea or

(1) *Resol. Holl.* 22 Dec. 1705 & 14 Aug. 1706, *G. P. B.* 5 D. p. 1528.

(2) Grotius, *de J. B. & P. L.* 2, C. 7, § 11; Huber, *de Jur. Civil.* L. 1, C. 19, n. 15 & 16.

(3) De Groot, *Int.* 2 B. 4 D. § 36; *Regtsgel. Obs.* 4 D. Obs. 18.

(4) P. à Leydis, *de cur. Reipl.* C. 1, § 3.

(5) For example, with *Denmark*, in 1324; with *England*, in 1495; with *France*, in 1678; with *Sweden*, in 1679; by the Peace of *Rijswijk*, in 1697; by the Peace of *Utrecht*, in 1713; not to speak of the *Treaties* with the *Turks*, *Morocco*, *Algiers*, *Tunis*, and *Tripoli*.

(6) *Plac. van Keizer Karel van* 13 Sept. 1549; *Plac. van Koning Philips*, 15 Meij, 1574; *Plac.* 4 Nov. 1606; 24 Meij, 1613;

stranded, at first within the period of a year or of a year and a day, and afterwards indefinitely without any limitation of time, is recognised. Finally the States of *Zeeland* in 1751 (1) and the States of *Holland* in 1772 (2) framed express regulations as to how goods saved from shipwrecked vessels were to be dealt with.

It appears from the aforesaid laws (3) to be the duty of every person to render all possible assistance to vessels in distress, to take care of all stranded goods, and at the same time to give immediate notice thereof to the commissioner of the pilots, or to the local Court. Whoever upon such an occasion is guilty of wrecking is severely punished, even with death if necessary (4). On the other hand, those who render assistance are entitled to reasonable *salvage*. In case of any dispute arising as to this salvage or the sum to be paid to the pilots, it is settled by the *commissioner* or *goodmen of pilotage*, from whose decision an appeal formerly lay to the college of the *Committee of the States-General* (5). After the Revolution of 1795 uncertainty arose as to this appeal. For a time the Court of Holland exercised this power (6); afterwards the *Maritime Board* of the Batavian Republic. Now

25 April, 1620; 2 Dec. 1663; 28 Jan. 1739. Compare also Prof. v. d. Keessel, *Thes. Jur. Holl. & Zeel. Thes.* 193-97.

(1) *Plac. Zeel.* 14 June, 1751; *G. P. B.* 8 Deel, pp. 907-13.

(2) *Plac. Holl.* 22 July, 1772; *G. P. B.* 9 D. pp. 811-13.

(3) See specially the *Placaats* of 24 Oct. 1698 & 22 July, 1772.

(4) Vide, among many others, the *Plac. of* 4 Jan. 1724, *G. P. B.* 6 D. p. 797.

(5) *Plac.* 24 Oct. 1698, Art. 12, *G. P. B.* 5 D. pp. 1310 & 1318; *Plac.* 22 July, 1772.

(6) *Inst. voor den Zeeraad van* 2 April, 1802, Art. 49 & 65.



the *Committee of Judicature of the Revenue by Land and Water* is the court of appeal in all matters affecting pilotage, and all disputes arising out of it (1).

## CHAPTER III.

### ON SHIPS, MORTGAGES ON SHIPS (BYLBRIEVEN) AND BOTTOMRY BONDS.

#### SECTION I.

*Ships.*

By a *ship* is meant such a vessel as is raised by means of boards upon its bottom or keel, and is thus borne through the water. However ancient ship-building may be (2), the Egyptians and Phœnicians were the first nations who practised navigation (3). The principal division of ships is, according to the purpose for which they were intended, into men-of-war and merchant ships. Both these classes are again subdivided—according to their *size*: e.g. men-of-war of seventy-four, sixty, fifty guns, etc., one or two-masted ships, etc.; according to their *build*: e.g. frigates, brigs, *fluiten*,\* galiots, smacks, etc.; according to the *regions* to which they sail: e.g. East-Indiamen, traders to the north, to Greenland, etc.; according to the *cargo* with which they are loaded: e.g. salt-traders, herring-boats, peat vessels, etc.; according to the *particular objects* for

(1) *Inst. voor dien Raad van 12 July, 1805, Art. 20, n. 4, & Art. 33.*

(2) N. Witsen, *aeloude en hedendaagsche Scheepsbouw en Bestier*, 1 D. 1-6 H.

(3) Huet, *Hist. du Commerce & de la Navig. des Anciens*, Ch. 7.

\* *Fluit-schip*, a three-masted troopship, of peculiar build, and 600 tons.—TR.

which they are intended : e.g. fire-ships, ferry-boats, barges or canal-boats, tenders, pleasure-boats, etc. To say nothing of the smaller kinds of vessels, which cannot be properly called ships : e.g. boats, rowing-boats, shallops, flat-bottomed boats, *letten*,\* punts, etc. (1).

## SECTION II.

Ships have various special rights which deserve to be noticed. And, first, of men-of-war. The rights of men-of-war.

1st. In our country they may not be built and equipped for or hired to any neighbouring powers for the purpose of injuring any allied or neutral powers (2).

2nd. No foreign men-of-war may enter our country coasts, harbours, roadsteads, rivers, or streams, upon pain of punishment and seizure of goods ; but only merchant ships, armed solely for their own defence and no other purpose, may enter and depart from the said places (3).

3rd. No men-of-war may be purchased in Holland without public authority, such foreign purchasers being thrown into prison (4).

4th. No ships taken into the service of the government may be loaded with any freight (5).

5th. No captain of a man-of-war may carry any

\* A kind of flat-bottomed boat.—Tr.

(1) N. Witsen, *d. l.* and the authors upon *shipbuilding*.

(2) *Plac. Gen.* 27 July, 1627, & 10 Dec. 1667, *G. P. B.* 3 D. p. 231 ; *Resol. Gener.* 19 July, 1674 ; *Resol. Holl.* 25 Meij, 1717.

(3) *Plac.* 31 Oct. 1563, *C.* 1, *Art.* 26, *G. P. B.* 1 D. col. 805.

(4) *Resol. Holl.* 6 April & 27 Aug. 1651.

(5) *Ord. Raad van Staaten*, 19 Jan. 1612 ; *Plac. Holl.* 24 Jan. 1660 ; *Plac. Zeel.* 30 Jan. 1662.

merchandise in his vessel, upon pain of being removed from his office, and being subjected to a discretionary punishment (1).

6th. No attachment or execution may be laid or levied upon any man-of-war belonging to the state, or its furniture, nor upon any arms or munitions of war whatsoever belonging to the state, for military or naval service (2).

7th. Men-of-war may not take on board any slaves who have escaped from their owners (3). What we might still add with regard to the duties of superior and inferior naval officers and with regard to *the crews and marines* would carry us beyond the limits of our space (4).

### SECTION III.

Merchant and  
other vessels.

There are also some special rights with regard to ships belonging to individual persons, employed in commerce and for conveying merchandise. The principal of these are the following :—

1st. Although ships from their nature must be classed under movable property (5), yet in some respects they are placed on the same footing as immovable property.

(1) *Plac. Gener.* 25 Aug. 1651 & 8 Maart, 1652, *G. P. B.* 1 D. col. 962; 21 Aug. 1656, *ibid.* 2 D. col. 494; 14 Nov. 1670 & 23 Sept. 1682, *ibid.* 3 D. pp. 1371 & 1423.

(2) *Resol.* 18 Dec. 1657, in the *Resol. van consid. van de Witt*, p. 424.

(3) *Resol. Gen.* 4 Meij, 1731, *G. P. B.* 6 D. p. 259.

(4) See on this point the *Articul-brief, rakende den oorlog ter Zee*, van 24 July, 1636, *G. P. B.* 2 D. col. 187; 16 Sept. 1672, *ibid.* 3 D. p. 209; 1 Dec. 1690, *ibid.* 4 D. p. 202; 8 April, 1702, *ibid.* 5 D. p. 275; also the *Generaale Ordre voor den dienst ter Zee*, in dato 11 June, 1795.

(5) Voet, *ad tit. ff. de rer. div. n.* 11.

Whenever they are sold to a third person, or otherwise alienated or pledged, and the ship is of the burthen of eight tons or upwards, a *judicial* transfer or deed of hypothecation thereof must be executed (1). At *Amsterdam* this must be executed before a notary and witnesses (2). Formerly a duty of two and a half per cent. had to be paid upon it (3). Now, inasmuch as this duty is abolished by the new system of taxation, the deed of transfer must be stamped with a stamp fixed by the law (4).

2nd. All ships or vessels plying on inland waters must be surveyed as soon as they are built, and before conveying any cargo, in order that the *inland tonnage, water, pleasure, and passage duties* may be levied upon them, according to their size. A certificate of this survey is drawn up. When a ship which has already been surveyed once, and has been burnt, is enlarged, permission to do this must first be granted to the shipwright, and the ship, after the rebuilding is completed, must be re-measured and surveyed; all this must be done under pain of such penalties as are affixed by the law (5).

3rd. A person who advances money for the building of a new ship, or labours upon it, has no tacit mortgage or preferent claim upon that ship; but a person who

(1) *Ordonn. van den veertigsten penning van de Schepen, van 7 Aug. 1748, G. P. B. 7 D. p. 1373; Resol. van Gecommitteerde Raaden, 27 Dec. 1748, ibid. p. 1394.*

(2) *Resol. Holl. 20 July, 1669, G. P. B. 8 D. p. 1990.*

(3) *Ordonn. 7 Aug. 1748.*

(4) *Ordonn. op het middel van 't Klein Zegel, 26 Nov. 1805, Art. 62.*

(5) *Ordonn. op het Passagie-geld, 26 Nov., 1805, Art. 8, 9, 10, 11, 12, 13, 14, 15, 18, 56, 57, 58, & 59.*



advances money for, or labours upon the *necessary repairs* of, an old ship, has (1).

4th. The inhabitants of this country may not let their ships to foreign nations to be used in the whale fisheries (2).

5th. All inhabitants of this country, not being owners of ships which are engaged in the *small fisheries*, and which are seized and captured by the enemy, are prohibited from buying any of these ships, or from bringing them to this country; with power to the owners to take these ships, on their coming to this country, as their own property, without any compensation for expenses, or the purchase amount paid for them (3). This was subsequently extended to the herring boats (*buysen*), and other ships engaged in the *large and herring fisheries*, and to their fishing-nets (4).

6th. In time of war the exportation of ships and materials for ship-building is everywhere prohibited (5).

#### SECTION IV.

Mortgages of  
ships (*Byl-  
brieven*.)

It sometimes happens that a person who has a new ship built, or buys an old one, has not sufficient money in hand to pay for it, but allows the debt, wholly or

(1) De Groot, *Intro.* 2 B. 48 D. § 13, on this point; Groenewegen, *in not.*; V. d. Keessel, *Thes.* 417. See moreover Leyser, *Medit. ad Pand.* T. 3, *Spec.* 159, *Med.* 1-6.

(2) *Plac. Gener.* 6 *Maart*, 1653; 17 *Maart*, 1656; 19 *Maart*, 1661; 24 *Maart* & 14 *Dec.* 1663, *G. P. B.* 2 D. col. 302, 2639, 2902, 3087, and van 16 *April*, 1681, *ibid.* 3 D. p. 1365.

(3) *Plac. Gener.* 28 *Feb.* 1678 & 22 *Oct.* 1705, *G. P. B.* 5 D. p. 1564.

(4) *Plac. Gener.* 22 *Meij*, 1706, *G. P. B.* 5 D. p. 1565.

(5) See examples of this in the *G. P. B.* 7 D. p. 490, & 9 D. pp. 108, 114, & 123.

partially to remain upon it, mortgaging the ship, with her masts, sails, and other furniture, expressly and specially, and further binding his person and property generally for such debt. The instrument which is executed thereof is called a *water or bylbrief* (1). The effect of this specially executed mortgage is that the holder thereof may sue and obtain judgment against the ship wherever it is sailing or being navigated, and in whosoever hands it may be found, for the purchase amount, as long as it remains unpaid (2); and this mortgage continues to exist even although the periods for payments fixed by the *bylbrief* have expired (3). If the ship is lost, or the proceeds thereof are not found sufficient to pay the debt, the purchaser still remains liable for the balance by virtue of the *general hypothecation*. A *bylbrief* does not rank preferent to a *bottomry* bond later in date; the reason for which is simply this, that a person who advances money upon bottomry has by this means preserved the ship and benefited the rights of the mortgage (4). *Bylbrieven* must be executed *judicially*; but at *Amsterdam* before a notary and witnesses (5).

(1) A form of this instrument may be found in Wassenaar, *Pract. Notar. C.* 9, § 6, and in the *Voorbeelden van Notariale Acten*, No. 75 (*Amst.* 1776).

(2) Wassenaar, *Pract. Notar. C.* 9, § 5; Hamerster, *Statut. van Vriesland*, 1 D. p. 471.

(3) Barels, *Advisen over den Koophandel*, 1 D. Adv. 75.

(4) L. 5 & 6, ff. *qui pot. in pign.* Holl. Cons. 3 D. Cons. 56 Bynkershoek, *Quæst. Jur. Priv. L.* 3, C. 16, p. 512; Barels, *d. l.* p. 399.

(5) Vide *supra*, § 3, n. 1.

## SECTION V.

Bottomry  
bonds.

Just as *bylbrieven* are passed upon the sale of ships, so *bottomry* bonds (1) are executed in case ships are mortgaged.

By a bottomry bond is meant a contract by which a certain sum of money is advanced as a loan upon the mortgage of the ship, and upon this condition—that if the ship should be lost through misfortune, the person who advanced the money shall have no further right to claim the repayment of the money advanced than in so far as any part of the ship may be saved ; and that upon her safe arrival, or if she be wilfully lost, the person who borrowed the money shall repay the money with a certain high interest (2). This is not an illegal or usurious contract, because the profit stipulated for is not the consideration for the loan of money, but a compensation for the risk which the person who advanced the money ran of losing both the principal sum and interest if the vessel were lost (3). This contract was known even to the Romans by the name of *fenus nauticum* or *pecunia trajectitia* ; although our bottomry does not agree with it in all respects (4).

From the nature of this transaction the privileges of this contract only arise if it is entered into in a foreign port, but custom has introduced the rule that this contract may be entered into in this country with the

(1) A form of this bond may be found in Wassenaar, *Pract. Notar. C.* 9, § 4 ; Verwer, *Nederl. Zeerechten*, pp. 254 & 255.

(2) Pothier, *Traité du Contrat de Prêt à la grosse Aventure*, Art. 1, § 1.

(3) Pothier, *d. l.* § 2 ; Emerigon, *Traité des Contrats à la grosse Aventure*, C. 1, Sect. 2, § 3.

(4) V. d. Keessel, *Thes.* 556 & 557.

consent of the majority of the owners of the ship (1). A mortgage of a ship or cargo under the pretended name of *bottomry*, but by which the person who advances the money is not exposed to any peril of the sea, does not make such mortgage a privileged transaction (2). A master who is forced during a voyage in foreign parts to run into a port where the owner of the ship does not reside, and has no correspondents, may take up money on *bottomry*, in order to do the necessary repairs, for which the owner, from whom he is supposed to have a tacit authority for this purpose, is responsible; but if the owner does reside at that place, the master may not do this without his express consent (3).

If the ship is indeed safe, but has suffered damage, the whole sum with the interest must be repaid according to the rule. *Bottomry is not subject to average*, which even holds in case the *bottomry* bond is only upon the cargo (4). By *the perils of the sea* which the person advancing money upon *bottomry* takes upon himself, is meant every peril occasioned by storm and bad weather, or by an attack of the enemy, or by the want of skill or negligence of the master, provided he does not deviate from his course (5). A subject,

(1) *Handv. van Amsterdam*, 2 D. p. 538, n. 21, & p. 541, *Waarsch. Holl.* 5 Feb. 1665.

(2) *Bynkershoek, Quæst. Jur. Priv. L. 3, C. 16, p. 515, seq.*; *Barels, Adviesen, over den Koophandel*, 1 D. Adv. 71, p. 382.

(3) *Roseboom, Recueil der Keuren van Amsterdam, Tit. 52*; *J. Weskett, Complete Digest of the Theorie and Practice of Insurance, Art. Bottomry, n. 3 & 6.*

(4) *Bynkershoek, Quæst. Jur. Priv. L. 3, C. 16, p. 514*; *V. d. Keessel, Thes.* 558 & 559.

(5) *V. d. Keessel, Thes.* 560.



however, of a neutral power who has advanced money upon bottomry for the necessary repairs of a ship, retains his right of hypothec upon that ship, although it is captured by the enemy during the voyage (1).

If the ship is lost, but some part of the tackle is preserved, either by being washed ashore or by salvage, the creditor must be paid out of the proceeds to the available extent, since bottomry bonds are passed *upon the ship's keel and furniture*; but if the debt cannot be satisfied out of the proceeds, the debtor is not liable for the deficiency, because the words of a bottomry bond are usually, "*in so far as this bottom brings so much to land*" (2). With respect to the ranking of a bottomry debt, it must be noted—

1st. That it stands on the same footing as the ranking of a debt for which any movable property has been pledged and delivered to the creditor.

2nd. That such a debt, being contracted from necessity in order to preserve the ship, is preferred to a prior *bylbrief*; and a later bottomry bond ranks before a prior one (3), unless several bottomry bonds have been executed within a few days of each other at the same place, in which case they all enjoy equal rights (4).

3rd. That debts subsequently contracted for the

(1) C. Asser, *Dissert. de jure, quod est civi gentis in bello medicæ, cui pro pecuniâ trajectitiâ navis est hypothecæ obligata, in ipsam navim, quæ in itinere, cujus caussâ contractus initus est, ab hoste capiatur* (L. B. 1799).

(2) Verwer, *Zeerechten*, p. 254; Bynkershoek, *Quæst. Jur. Priv.* L. 3, C. 16, p. 409.

(3) *Arg. L. 5 & 6, ff. qui pot. in pign.*; Loenius, *Decis. & Observ.* C. 127.

(4) *Handv. van Amsterdam*, 2 D. p. 538.

preservation of the ships: e.g. salvage, etc., are preferred to the bottomry debt (1).

4th. After payment of such last-mentioned debts, the owner ranks before the holder of the bottomry bond in respect of such debts, even if he has not taken any cession of action (2).

5th. A bottomry bond passed upon certain specified goods ranks before a bottomry bond upon goods in general (3).

6th. If the person to whom the goods are consigned has received the bill of lading, and, relying upon it, has accepted bills of exchange or paid expenses, he is preferred to the holder of the bottomry bond (4).

The amount of interest or profit which is paid upon the safe arrival to the person advancing the money varies, and is proportioned to the greater or lesser risk which he may be considered to run (5).

## CHAPTER IV.

### ON SHIPOWNERS, MASTERS, AND MARINERS.

#### SECTION I.

By a *shipowner* is meant a person who builds a ship at his own expense, or acquires one as his property by purchase, with the object of freighting her. Frequently

Rights of joint  
shipowners.

(1) *L.* 6, § 1, *ff. qui pot. in pign.*; Verwer, *Zeeregten*, §§ 22 & 23.

(2) Verwer, *d. l.*

(3) Barels, *Adviesen over den Koophandel*, 1 *D. Adv.* 66, p. 364.

(4) *Handv. van Amsterdam*, 2 *D. p.* 538.

(5) Roccus, *von Schepen en Vragtgelden*, n. 137, *seq. p.* 75, *seq.*; Pothier, *du Prêt à la grosse Aventure*, *Art.* 2, § 4.

several persons join together for the purpose of freighting a ship for their joint account. The rights and obligations of joint shipowners, both as between themselves and with respect to third persons, must be deduced from what was said above (1) of *partnerships* or *companies*, and also from the terms of the contract which is usually entered into with respect to co-ownership of the vessel, and which is called the *deed of shipownership* (*reeder-cedul*).

The joint shipowners frequently nominate one of their number to administer the affairs of the co-ownership, who is called the *Boekhouder* (lit. *book-keeper*). His power depends upon the limitations contained in his authority. Where these are silent, then recourse is had to what the law says about factors (*institores*); for his acts each of the shipowners is liable in proportion to his share in the ship (2). He is also bound, after the expiration of the voyage, to render an account to all the owners (3). The joint shipowners are bound to remain in the co-ownership until the vessel has completed her intended voyage, unless—

1st. The majority of the shipowners wish to make an alteration in the plans determined upon.

2nd. The master, being himself a part owner, is dismissed by the shipowners.

3rd. A part owner dies;

4th. Or becomes bankrupt (4).

(1) Vide *supra*, pp. 397–405.

(2) De Groot, *Introd.* 3 B. 1 D. § 31; Voet, *ad tit. ff. de instit. act* N. 2.

(3) *Handv. van Amsterdam*, 1ste Vervolg, p. 119.

(4) G. F. von Martens, *Grundriss des Handelsrechts*, 3 B. 4 Abschn. § 157.

In the co-ownership of a vessel there are also the following peculiarities:—

1st. The shipowners who together own more than a half of the ship may sell her for the joint account (1).

2nd. So also the shipowners who together own more than a half of the ship may let her, and may raise the money necessary for equipping her upon bottomry, in so far as the shares of the dissenting shipowners are concerned; or, if the money has been advanced by themselves, they may recover it out of the shares of the dissenting shipowners (2).

3rd. If the master is a part owner, and owns, either solely or jointly with the consenting shipowners, more than half of the ship, he may undertake a voyage for a reasonable freight, by which the shares of all the shipowners, even those of the dissenting shipowners, are bound (3).

## SECTION II.

The master is bound to conform to the orders and instructions given him by the shipowners. Further, it is his duty to use all due diligence, supervision and seamanship in the outward and homeward voyage; and therefore he is specially bound—

Law as between the shipowners and the master.

1st. On taking charge of the vessel, and before taking in the cargo, to examine the ship and to give notice to the shipowners of any defects discovered, and to have them repaired.

2nd. To take care of the proper loading of the vessel, and to avoid all overloading.

(1) *Holl. Cons.* 6 D. 2 *Stuk*, *Cons.* 51, p. 431.

(2) *V. d. Keessel*, *Thes.* 709.

(3) *Ibid.* *Thes.* 710.



3rd. To take no goods with him on his own account, not even in his cabin, without the consent of the shipowners.

4th. Not to leave the ship or to pass the night away from the ship unless obliged.

5th. To set sail with the first fair wind.

6th. Not to deviate from the course prescribed to him, nor to enter another port unless obliged.

7th. Not intentionally to quit convoy.

8th. To take in pilots where necessary, and to leave it to their charge to bring the vessel into safe harbours.

9th. In cases of difficulty to hold a council on board and to conform to its opinion.

10th. To give notice to the shipowners or their agents of all important occurrences.

11th. To keep, or cause the mate to keep, a proper log-book.

12th. And in every possible way to look after the safety of the ship and cargo (1). The master is bound to indemnify the shipowners for all damage occasioned to the vessel by his want of good faith or gross neglect in the observance of his office. If abroad and in want of money he may, according to the exigency of the case, sell the goods of the shipowners, or take up money on bottomry; but he may not sell the vessel without the consent of the shipowners (2). The master may not, without the express consent of the shipowners, take on

(1) G. F. von Martens, *Grundriss des Handelsrechts*, 3 B. 5 Abschn. §§ 161 & 162.

(2) *Plac.* 31 Oct. 1563, *Tit.* 2, *Art.* 12; De Groot, *Introd.* 2 B. 5 D. §§ 16 & 48, D. § 5, 3 B. 20 D. § 47, and 23 D. § 4; Voet. *ad tit. ff. de exerc. act. n.* 3.

board any merchandise which may not be imported into the port of his destination, or in any other way occasion injury to the vessel by any crime on his part; if he does so, he is liable for damages (1). The shipowners cannot be made liable, by any act of the master beyond the scope of their instructions, for more than their shares in the vessel (2). When the voyage is completed, the master is bound to render a proper account which the shipowners are bound to audit, settle, and to pay to the master (3), without, however, being liable to the master for more than their share in the ownership of the vessel (4).

### SECTION III.

The owners of a vessel frequently do not freight her themselves, but charter her for freight; whence certain special rights and obligations arise between the freighters and the master. The contract which is entered into with regard to such freighting, and which must first be consulted and followed in the case of events happening, is called a *charter-party* (5). The master gives the skipper a written acknowledgment of the goods loaded on board, containing a statement of the goods, their quantity, marks and numbers, the place of destination, the name of the freighter, and often also of the consignee, and the freight stipulated for. This is called a *bill of lading*. A master engaged

Law as  
between the  
freighters and  
the master.

(1) Voet, *ad d. t. n. 7*; Van der Keessel, *Thes.* 696.

(2) De Groot, *Introd.* 3 B. 1 D. § 32, no. 42-44.

(3) Ibid. *Introd.* 3 B. 23 D. § 5; Van Glins, *Zeeregten*, p. 16, *seq.*; Voet, *ad tit. ff. de exerc. act. n. 8*.

(4) Ibid. *Introd.* 3 B. 20 D. § 48; Barels, *Adviesen over den Koophandel*, 1 D. Adv. 6.

(5) Pothier, *Traité des Contrats de Louages maritimes*.

by a merchant here to fetch a cargo from abroad, and who is hindered there by arrest imposed upon him by the authorities, or if the merchant does not think fit to load a cargo, is entitled to demand the *whole* freight (1); but if a ship, while abroad, is chartered to load a cargo at some other place, also abroad, and on arriving there is prevented by the authorities from loading without any fault of the merchant, the master is only entitled to *half* of the freight (2). If a ship lying in any of our ports is prevented by the authorities from making the voyage undertaken, the skipper and the master are mutually absolved (3). If the merchant is not ready to load at the appointed time, he may make the master wait for *fifteen* days, provided he pays him for demurrage; and if he is not ready then, and not willing to load, he must pay the master the stipulated freight and demurrage (4), of which demurrage the crew receive one-fourth (5).

The master must indemnify the merchant for the damage caused by any defect in the ship, by leakage, by bad stowage, etc.; but he is not bound to do so if he and two or three of the crew declare under oath that the goods were damaged by an unforeseen accident. The master must nevertheless take proper care of the goods, and may recover the extraordinary expenses against the goods (6). A master must provide himself

(1) *Placaat* 31 Oct. 1563, *Tit.* 2, *Art.* 2, *Consulaat van de Zee*, *Kap.* 81.

(2) *Plac.* 1563, *Tit.* 2, *Art.* 3.

(3) *Ibid.* *Art.* 4.

(4) *Ibid.* *Art.* 5; Verwer, *Nederl. Zeeregten*, p. 69.

(5) De Groot, *Introd.* 3 B. 29 D. § 6.

(6) *Plac.* 1563, *Tit.* 2, *Art.* 6; Roccus, *van Schepen en Vragtgelden*, *Art.* 69, p. 95, *Consulaat van de Zee*, *Kap.* 61, *seqq.* p. 75, *seqq.*

with good ropes for loading and unloading ; he must show these to the merchant, otherwise he is liable for the damage (1). A master is liable for the diminution of or damage to the goods on board his vessel, caused by the fault of the master or crew, to the extent of the price which they would have fetched at their place of destination ; but if the damage is occasioned otherwise, as by spoiling, leaking, melting, or overloading by the merchant, and without the fault of master or crew, it falls upon the merchant. If the ship lies too deep through overloading, so that the master must unload some of the cargo, the merchant must suffer the damage occasioned to such cargo without the fault of the master or crew (2). If a vessel is shipwrecked, the master and crew are bound to use all possible diligence to secure and preserve the cargo, and if possible to repair the vessel, and to bring the cargo to its place of destination. But if the vessel cannot be repaired, he must charter another vessel, and complete his voyage with it ; in both cases the master receives his whole freight (3), and no deduction for salvage may be made (4). When the ship has arrived at her port of discharge, she must be unloaded within fifteen days, unless in case of great obstacles (5). If there is any dispute as to whom the cargo belongs, or if an arrest is laid upon it, the holder of the bill of lading applies to the court for leave to warehouse the cargo, or even to sell the perishable goods, whether the fear of deterio-

(1) *Plac.* 1563, *Tit.* 2, *Art.* 7.

(2) *Plac. ibid.* *Art.* 8, 9, & 11.

(3) *Plac.* 1563, *Tit.* 3, *Art.* 3.

(4) Bynkershoek, *Quæst. Jur. Prin. L.* 4, *C.* 24, *p.* 722 ; V. d. Keessel, *Thes.* 681.

(5) *Plac.* 1563, *Tit.* 2, *Art.* 13.



ration arises from the nature of the cargo or from the fact of their being damaged. Just as the consignee is entitled to demand the discharge of the cargo, so the master is entitled to claim his freight, as security for which he has a tacit mortgage (*legal hypothec*) and lien (*right of retention*) upon the cargo loaded (1).

## SECTION IV.

Law as  
between the  
passengers and  
the master.

Passengers, who make the voyage on payment of certain passage money, are obliged to provide for their own requirements, unless they have made an agreement with the master to be found in food and drink, which is usually the case; although no such agreement has been made, the master is at all times obliged, in case of necessity, to supply them with necessaries of life upon payment. On the other hand, they must assist the master in case of need from their own stock, as far as they can spare it, upon payment; nay, they must even in cases of urgent necessity lend a helping hand to save the ship (2). They are bound to go on board at the first notice from the master, and, if the ship is ready to sail, not to leave it; if, however, they do so, the master may sail away, and claim his full passage money. The master is not bound or at liberty to make deviations from his course in order to land passengers. The master is only answerable for the luggage they take with them, if it has been received and loaded by him-

(1) *Plac. d. Art.* 13; *V. d. Keessel, Thes.* 682-84. *Vide supra*, p. 93.

(2) *G. F. von Martens, Grundriss des Handelsrechts*, 3 B. 8 Abschn. § 181.

self, or if the damage has been occasioned to it by the fault of the master or crew (1).

## SECTION V.

The rights and obligations of the crew towards the master stand on the same footing as those of boarded servants towards their master, in so far as the laws have not made any special regulations upon this point (2). When a person has engaged himself as a mariner or sailor his name is inscribed on the muster-roll. If a mariner has engaged himself to two masters, the first engagement is valid (3); and he who knowingly engages a mariner who is already engaged forfeits double the wages (4). All persons engaged to serve on a vessel must be on board with their kit and clothes within twenty-four hours after notice from the master, to ballast and load the ship and to make her ready for sea, or the master may engage another in their place, the mariners nevertheless remaining bound (5). Mariners engaged by the master may not leave the ship on account of danger or bad news without the consent of the master, but, on the contrary, are bound to complete the voyage they have undertaken. Those who act contrary to this forfeit their wages, render themselves liable for damages, and may even, if necessary, be punished as *deserters* (6). A mariner may not leave

Law as  
between the  
master and the  
mariners.

(1) Martens, *ibid.* § 182.

(2) *Ibid.* 6 *Abschn.* § 165.

(3) *Plac.* 31 Oct. 1563, T. 2, Art. 3.

(4) *Plac. d. Art.* 3; Voet, *ad tit. ff. de priv. del. n.* 3.

(5) *Ordonn. Rotterd.* 1721, Art. 186 & 187, and other maritime laws.

(6) *Plac.* 1563, T. 2, Art. 1 & 2.

the ship without the leave of the master, and must, when summoned, return on board; if he stays behind he is punished with the forfeiture of his wages (1). A mariner who has declared himself to be an able seaman, and is found not to be so, forfeits his wages, and is punished with a discretionary punishment (2). The master is bound to supply his crew with food and drink three times a day (3).

Formerly those who served on board a vessel were allowed a certain *voering*, that is, to buy certain small articles of merchandise with their own money, and to convey them in the ship without payment of freight, but since the exemption from import and export duty in this respect has been withdrawn, this *voering* has fallen into disuse (4).

All mariners must assist the master in the management of matters connected with the ship; they must also defend the ship against enemies and pirates, and in all these matters they must obey the master without showing opposition. The master may punish the disobedient by word and by deed, just as a master may his man-servant (5). Punishments on board ship consist in partial forfeitures of wages, light flogging, etc. (6). Mariners who commit grave offences are put in irons, and on arriving at land are delivered

(1) *Plac. d. l. Art. 4*; V. d. Keessel, *Thes.* 691.

(2) *Plac.* 1563, *Tit.* 5, *Art.* 7; *Regtsg. Observ.* 1 D. *Obs.* 87; V. d. Keessel, *Thes.* 690.

(3) *Plac. d. l. Tit.* 2, *Art.* 10.

(4) De Groot, *Introd.* 3 B. 20 D. §§ 25-30; *Plac.* 22 Feb. 1657, G. P. B. 2 D. p. 2468, *Resol.* 21 Feb. 1671, G. P. B. 3 D. p. 1270; Verwer, *Zeeregten*, pp. 86 & 87.

(5) *Plac.* 1563, *Tit.* 5, *Art.* 1.

(6) *Plac. d. Art.* 1 & 2.

into the hands of justice (1). The master is bound to take care of the sick, and especially those who become sick while serving on board, as much as the occasion will permit, and to let them draw their full wages; but he is not bound to retain in his service those who have rendered themselves unfit through drunkenness, fighting, or violent conduct (2). If one of the crew dies, either a natural death, or even if he should meet with his death while serving on board, his heirs draw the full wages, after deducting the funeral expenses (3). If a master dare not complete the voyage, on account of war, pirates, etc., he may discharge his crew, with a payment of one-fourth of their wages (4). But an arbitrary discharge by the master is as unlawful as it is for the crew to leave at their will (5). In the engagement of mariners this peculiar right exists, that the master, altering his voyage, may retain them in his service, provided their wages are reasonably raised (6). In case of shipwreck, should the whole vessel and cargo be lost, the crew lose their wages; but if the furniture of the ship and cargo be saved, they are entitled to be paid thereout, and to a reasonable salvage besides (7). If the voyage is completed and the ship unloaded, the master is bound to give the crew their discharge, and to pay their wages without delay. If he delays in this, he becomes liable for damages (8).

(1) *Plac. d. Art.* 24-6, and Van Glins in his *Aanmerk.* upon it.

(2) De Groot, *Introd.* 3 B. 20 D. § 43.

(3) *Ibid. d. l.* §§ 44 & 45; V. d. Keessel, *Thes.* 695.

(4) *Plac.* 1563, T. 2, *Art.* 9.

(5) *Plac. ibid. Art.* 13.

(6) De Groot, *d. l.* § 39; V. d. Keessel, *Thes.* 693.

(7) *Ibid. d. l.* § 42; V. d. Keessel, *Thes.* 694.

(8) Van Glins, *Zeeeregten*, p. 37.



## CHAPTER V.

### ON AVERAGE AND LOSSES AT SEA.

#### SECTION I.

Average.

SINCE a certain *community* exists between ship-owners, freighters, masters, mariners, and persons sailing with them, who intrust their lives and property upon one and the same bottom (1), it follows that the damage occasioned to the ship or cargo during the voyage by unforeseen accidents should be borne in common. This damage is called *average*. This is divided into *ordinary average* and *great or general (gross) average* (2).

#### SECTION II.

Ordinary average.

*Ordinary average* is assessed only upon the merchandise, and not upon the ship (3). The practice in this respect is—that if the *ship is disposed of to piece-goods*, i.e. is loaded by several merchants with different merchandise, the master stipulates in the bill of lading for a certain per centage; e.g., ten per cent. on the freight, as compensation for the ordinary average; and that if *the whole ship is freighted by one merchant*, and if no stipulation upon this point has been made in the charter-party, the average is borne to the extent of

(1) De Groot, *Introd.* 3 B. 29 D. §§ 1 & 8.

(2) There is a great dispute upon the uncertain origin of this word. The opinion of Bynkershoek, *Quæst. Jur. Priv. L.* 4, C. 24, p. 718, is most generally accepted, who derives it from the word *averagia*, which was used in the later Latinity for *losses at sea*.

(3) Verwer, *Zeerechten*, p. 223.

two-thirds by the freighter, and to the extent of one-third by the master (1). Under this ordinary average are now included pilotage, lighthouse and beacon dues, lighterage, harbour dues, etc. (2).

Besides this ordinary average there is also a *special* or *particular average*, and which relates *either* to the ship solely: e.g., damage caused to the ship by overloading, or neglect of the master, or when anything is broken, stranded, spoilt or lost by stormy weather or misfortune, all of which falls exclusively upon the master and the shipowners (3); *or* to some of the freighters only: e.g., if some of the cargo on board is spoilt or is subject to certain special charges, all of which falls exclusively upon such particular freighters, and is not assessed upon the whole cargo (4).

### SECTION III.

By *general* or *gross average* is meant all damage General (or gross) average. arising from a voluntary act done for the preservation of ship and cargo, or to avoid a greater and obvious danger (5). This is assessed *upon ship and cargo*.

### SECTION IV.

The *jettison of goods*, to lighten the vessel in case of Jettison. a storm or of the ship being chased by enemies or

(1) Verwer, *d. l.* pp. 116-121 & pp. 272 & 273.

(2) Ibid. *d. l.*

(3) De Groot, *Introd.* 3 B. 29 D. § 14; Voet, *ad tit. ff. ad Leg. Rhod. de jact. n.* 10; V. d. Keessel, *Thes.* 790-92.

(4) G. F. von Martens, *Grundriss des Handelsrechts*, 3 B. 9 Abschn. § 184.

(5) *Ordonn. Rotterd.* 1721, Art. 83.

pirates, is one of the principal cases of general average; so also the damage caused to other merchandise by the jettison. In order to assess this damage it is requisite—

1st. That it was *necessary*. If, therefore, a ship, which went to sea after war had broken out, runs into a harbour through fear of the enemy, which did not, however, chase her, and remains lying there waiting for convoy, the extraordinary expenses of the maintenance and the wages of the crew are not the subject of average (1); but they would be such if the ship received news of the war while at sea, or if she was ordered to sail under convoy and had not fallen in with it, and the voyage had therefore been delayed (2).

Now in order to furnish proof of the necessity, the master must, before throwing overboard, or cutting away, consult the merchant or his agents, if they are on board, or the principal mariners upon the matter, and follow the opinion of the majority; in default of which he himself would be held liable for damages. On arriving at land the master must make a declaration under oath that the jettison took place through necessity and by common counsel (3).

It is necessary—

2nd. That the jettison actually avoided and prevented the destruction or capture of the ship. If therefore a ship has thrown goods overboard in order to escape a danger, but is notwithstanding shortly after lost

(1) Bynkershoek, *Quæst. Jur. Priv. L.* 4, C. 25, p. 734, *seq.*

(2) V. d. Keessel, *Thes.* 783.

(3) De Groot, *Introd.* 3 B. 29 D. § 10; Van Glins, *Zeevergen*, p. 69, *seq.*; Roccus, *van Schepen & Vragtgelden*, p. 122, *seq.*; V. d. Keessel, *Thes.* 785.

through the same misfortune, no compensation by way of average takes place, but each person retains whatever goods of his are saved (1). But if the ship is afterwards lost by another accident, the cargo that is saved, provided it be of considerable importance, must contribute to the first loss: provided however that the freight of the goods saved be paid, and the salvage be paid by way of average (2).

Not only the loss caused by the goods being thrown overboard, but also the loss caused to those goods which were damaged upon the occasion of the jettison must be paid for (3).

#### SECTION V.

The loss of general average must be borne—

1st. By the owners of the ship, who contribute in proportion to the value of the ship or of the whole freight, according as the ship or freight would contribute most (4).

How, by whom, and upon what, average is contributed.

2nd. By the owners of the merchandise which remains, in proportion to its value. With regard to the assessment of this value the custom has been adopted that if half of the voyage has been completed the goods must be valued at what they would have fetched at the place of their destination; but if half the voyage has not been completed they must be valued at what they cost at the place where they were purchased (5).

3rd. By the owners themselves of the goods thrown

(1) Bynkershoek, *Quæst. Jur. Priv. L. 4, C. 24, p. 721, seq.*

(2) V. d. Keessel, *Thes.* 786.

(3) *Ordonn. Rott.* 1721, *Art.* 85; Pothier, *Traité des Avaries*, *Sect. 1, Art. 2.*

(4) V. d. Keessel, *Thes.* 788.

(5) Bynkershoek, *Quæst. Jur. Priv. L. 4, C. 21, p. 698.*



overboard, in proportion to the value of those goods; otherwise they would be in a better condition than those whose goods remained on board the ship, which would not be fair (1).

4th. By the passengers or persons sailing with the ship, upon their clothes and what they carry with them. But this must not be extended to the crew.

Among the goods upon which or by which average must be contributed, is understood to be included not only the merchandise loaded in the ship, but also clothes, gold, silver, jewels, and everything which is brought on board in coffers or otherwise: provided that the goods of great value were declared in due time, before the jettison, to the master; or they are not considered to be anything else than what the coffers and packages externally appeared to be (2).

The throwing or hurling overboard of goods laden on the upper deck is not the subject of any average. However, goods stowed between the orlop deck and the gallows of ships coming from the *Baltic*, and thrown overboard in case of need, are the subject of average at *Amsterdam* (3).

But since the property is not lost in goods by throwing them overboard, during a storm or bad weather, in order to lighten the vessel (4), it follows, therefore, that if these goods are afterwards found again by swimmers, divers, fishermen or others, they can be re-

(1) Voet, *ad tit. ff. ad Leg. Rhod. de jact. n.* 16.

(2) De Groot, *Introd.* 3 B. 29 D. §§ 11 & 13; V. d. Keessel, *Thes.* 789.

(3) Vide d. Keessel, *Thes.* 792; *Handv. van Amsterdam*, 2 D. p. 657, col. 1, *in med.*

(4) Vide *supra*, p. 51.

claimed by the owners upon payment of the expenses incurred in recovering them (1).

The master of the ship which has suffered the damage has not only a *lien* but a *tacit mortgage* upon the remaining goods which are saved, and which have to contribute to the average; which right is also granted to the owners of goods which were thrown overboard or otherwise lost and damaged in cases which are the subject of general average. However, no one is liable on account of average for more than the ship and goods which must contribute to it; so that every one is released by abandoning them (2).

The action for compelling payment on account of average ought to be considered, owing to the perfect similarity of reasoning, to become prescribed within the same short period of time within which the action against insurers becomes prescribed (3).

§ 46. The master must with the greatest possible accuracy enter every case of average in his log-book, and at the first harbour which he enters must give a detailed account of it to the maritime court there, or to the consul of his nation, and take a certificate thereof; he must also give notice thereof to the shipowners and freighters as soon as possible, and especially to the Board of Maritime Causes at the place of his destination, and, together with the principal of his ship's company, must confirm by oath his log-book and his declaration. Upon this the average statement is generally made out by a sworn committee, and the amount

(1) Pothier, *Traité des Avaries*, Sect. 1, Art. 5.

(2) V. d. Keessel, *Thes.* 793.

(3) Voet, *ad tit. ff. ad Leg. Rhod. de jact. n.* 11, *in fine*. Prof. V. d. Keessel, *Thes.* 795, is of a different opinion.

to be borne by those who must contribute is assessed and settled by a kind of judgment by commissioners of maritime causes, to which the name of *Despache* is given (1).

## SECTION VI.

Other cases of  
average.

There are still some other cases besides jettison in which general average is calculated upon ship and cargo (2). Under this head may be placed the cases—

1st. When any goods have been given or pointed out, or something has been promised, to an enemy's ship, pirate or wrecker, to ransom, liberate or get back the ship or cargo (3).

2nd. When anchors or the masts are cut away, and, in order to get rid of the masts, the rigging or tackle is broken or thrown overboard in order to preserve the ship and cargo (4). Under this head are included the cases when holes are bored in the ship to allow the water flowing in to run to the pumps; the cutting away or slipping of anchors which could not be weighed quickly enough to sail with the convoy. The cutting away of the boat is a subject of average, if it could easily have been secured on board, but otherwise not (5).

(1) G. F. von Martens, *Grundriss des Handelsrechts*, 3 B. 9 Abschn. §§ 187 & 188.

(2) Pothier, *d. l. Sect. 2*.

(3) *Ordonn. Rotterd.* 1721, *Art.* 100. Is the claim or general average just or not when ships are captured by the enemy, and the ships only, or the ships and cargoes, or the cargoes only are declared forfeited? This question is discussed by P. Sanderus, *Vertoog. over de Avarië-grosse* (Amst. 1802).

(4) De Groot, *Introd.* 9 B. 29 D. § 10.

(5) *Ordonn. Rott.* 1721, *Art.* 86-90; V. d. Keessel, *Thes.* 78.

3rd. The costs of hiring lighters to save the ship and cargo are the subject of general average; but if this is done only to float the ship, a third is borne by the ship, and two-thirds by the cargo. If the cargo is trans-shipped, during a storm or otherwise, into a lighter in order to float the ship, and is lost, the loss of the cargo is the subject of general average (1).

4th. The loss sustained through the wounding or maiming of a mariner during the ordinary service on board is borne by the master or shipowners; but if the ship is attacked by an enemy, pirate or wrecker, or owing to *signalling* has fallen into action, the expenses of the cure and the compensation for the maiming are the subject of general average (2).

5th. The expenses of unloading in order to be able to enter a harbour or river (3).

## SECTION VII.

Among losses at sea, the damage which vessels cause to each other *by collision or running down* ought specially to be noticed. If a ship, either under sail or lying at anchor, is damaged by the collision or running down of another ship, the vessel which, through malice or carelessness, is to blame is bound to bear the loss alone (4). If they are both equally to blame, each bears her own loss (5); but the masters are liable to the owners

Running down  
of ships.

(1) De Groot, *Intro.* 2 B. 29 D. § 16.

(2) Ibid. *d. l.* § 9; V. d. Keessel, *Thes.* 782.

(3) *L.* 4, *pr. ff. ad Leg. Rhod. de jact.*

(4) *Plac.* 31 Oct. 1563, *T.* 4, *Art.* 1.

(5) Bynkershoek, *Quæst. Jur. Priv. L.* 4, *C.* 22, *p.* 705, *seqq.*; V. d. Keessel, *Thes.* 816.



of the merchandise for damages. If it is not clear by whose fault the collision or running down was caused, and they could therefore not have avoided each other, the loss on both sides is borne in moieties (1); and it makes no difference whether the vessels were sailing on the sea or on inland waters (2). By this loss is meant not only that occasioned to the vessels, but also that caused to the cargo on board, and, even if one ship has discharged her cargo, the ship and cargo are liable to make good the damage (3). This loss is not limited merely to that which was caused by the collision or running down itself, but includes that which subsequently resulted from the same cause: e.g. if the ship run down is unable to sail with convoy, and is captured by privateers (4).

Although the law clearly defines that each ship must bear a half of the damages, it is more doubtful whether this half should be calculated *arithmetically*, that is, the absolute half, or *geometrically*, that is, in proportion to the greater or lesser value of each ship. Very many weighty reasons may be advanced for the geometrical calculation (5), but the arithmetical seems to meet with greater favour in practice (6). If my ship runs into the bows of yours, which was lying at anchor, or moored, and mine also suffers damage, I must bear the half of the damage I have caused you, but you do not bear the half of the damage I have

(1) *Plac.* 1563, *d. Art.* 1; De Groot, *Intro.* 38 *D.* § 16.

(2) Bynkershoek, *Quæst. Jur. Priv. L.* 4, *C.* 19.

(3) *Ibid.* *d. l. C.* 18, *p.* 675, *seqq.*; V. d. Keessel, *Thes.* 813.

(4) Bynkershoek, *d. l. C.* 22, *p.* 708; V. d. Keessel, *Thes.* 814.

(5) *Ibid.* *Quæst. Jur. Priv. L.* 4, *C.* 20, *p.* 689, *seqq.*

(6) Neostadius, *Supr. Cur. Decis.* 48 & 49; Coren, *Obs.* 40 & 41.

suffered (1). This is even the case although the ship lying at anchor has not paid out her cables, unless, when called upon to do so by the master of the driving vessel, she could have done so without danger (2).

It is the custom, however, in the roadsteads of *Texel*, that vessels driving against each other, owing to a storm or bad weather, may save themselves as they best can by cutting away the other's cables, without giving rise to an action for damages (3). If a vessel drives upon the cables of an adjoining ship lying at anchor and cuts the cables, whereby the last-mentioned vessel, being parted from her anchors, is shipwrecked, she is liable to make good the whole damage (4). If two ships lying at anchor damage each other, without the cables breaking, through rubbing against each other, the damage must be borne in equal shares (5). If a vessel under sail runs into a moored ship, she has no action for the damage she herself sustains, but must pay half of that sustained by the moored ship, provided she declares under oath that it was not her fault. If it can be proved that it was her fault, she is liable for the whole damage (6).

(1) De Groot, *Intro.* 3 B. 38 D. § 17; Bynkershoek, *Quæst. Jur. Priv. L.* 4, C. 21, p. 701.

(2) Bynkershoek, *d. l. C.* 22, p. 704.

(3) Barels, *Adviesen over den Koophandel*, 1 D. Adv. 31-33.

(4) V. d. Keessel, *Thes.* 819.

(5) Bynkershoek, *Quæst. Jur. Priv. L.* 4, C. 18, p. 673, *seqq.*

(6) De Groot, *Intro.* 3 B. 38 D.; V. d. Keessel, *Thes.* 821.

## CHAPTER VI.

## ON INSURANCES.

## SECTION I.

Insurance. IN order that the diasters which happen to ships at sea, or their cargoes, through storms or enemies might not be borne by one person, but by several, the *contract of insurance* was, even in very old times, adopted and was also in use in this country. Various laws, both general and local, have been enacted upon this subject (1). By *insurance* is meant "a contract by which the one contracting party takes upon himself the risk of accidental misfortunes to which a certain thing is exposed, and binds himself to the other contracting party to save him harmless from all the injuries caused by these misfortunes, upon condition of receiving a certain sum of money, which the other contracting party promises to give him in consideration

(1) *Plac. van de Zeerechten van Koning Philips*, 31 Oct. 1563, T. 7, *Plac.* 20 Jann. 1570; *Ordonn. te Amsterdam*, 10 Maart, 1744; *Handv.* 2 D. p. 662, *seqq.*; 27 April, 1745, *ibid.* 3 D. p. 1666; 30 Jann. 1756, *Handv.* 2de Vervolg. p. 89, *seqq.*; *Ordonn. te Rotterdam*, 28 Jann. 1721, Art. 23-82; *Ordonn. te Dordrecht*, 13 Julij, 1775; *Ordonn. te Middelburg*, 30 Sept. 1600, *en de Ampl. derzelve*, 4 Feb. 1719. Of the authors who have specially treated of this subject we ought to mention: Pothier, *Traité du Contrat d'Assurance*, in his *Traités du Droit*, tom. 3, pp. 1-75; B. M. Emerigon, *Traité des Assurances et des Contrats à la Grosse (Marseil.* 1783, 2 vol. in 4to); J. Weskett, *Complete Digest of the Theorie and Practice of Insurance* (London, 1781, in fol.); J. A. Park, *System of the Law of Marine Insurance* (London, 1800, in 8vo); A. Baldasseroni, *Delle Assicurazioni Marittime Trattato (Firenz.* 1786, 3 tom. in 4to), and some others.

of the risk he takes upon himself" (1). Various things may be the subject of insurance. Thus there are, e.g., insurances of houses and buildings against fire (2); but this contract is principally entered into with regard to the perils of the sea. The person who takes the risks upon himself is called the *insurer*; the persons secured against damage that may happen, the *assured*; the sum paid in consideration of the risk, the *premium of insurance*; the contract which is entered into in writing with regard to this transaction, the *policy of insurance*.

## SECTION II.

The requisites which are essential to an insurance consist in the following: What may be insured.

I. *A thing capable of being insured.* Under this head may be included—

*a.* The ships themselves, or, as it is usually expressed, the keel of the ship, with its spars, standing and running rigging, anchors, cables, guns, etc. (3). It is immaterial whether the ship is an old or new one (4).

*b.* All kinds of goods, wares and merchandise, perishable or not, without exception (5).

*c.* The expenses of loading, and premiums of insurance already paid or still to be paid (6).

(1) This is the accurate definition of Pothier, *d. l. Chap. 1, Sect. 1, n. 2.*

(2) V. d. Keessel, *Thes.* 716.

(3) *Ordonn. Amst. Art. 7, Rott. Art. 25, Dordr. Art. 29, Middelb. Art. 4, & Ampl. Art. 3.*

(4) Bynkershoek, *Quæst. Jur. Priv. L. 4, C. 6, p. 567.*

(5) *Ordonn. Rotterd. Art. 25, Dordr. Art. 29; V. D. Keessel Thes. 721.*

(6) *Ordonn. Rott. Art. 25, Dordr. Art. 29, Amst. Art. 22, Middelb. Art. 3, & Ampl. Art. 2.*



*d.* Freight to be earned (1).

*e.* The pay or wages of the mariners (2).

*f.* The money advanced upon the bottomry of ships or the cargo loaded in them: provided this be positively expressed in the policy of insurance (3). Not only the money, but also the goods bought with it and loaded on board are at the risk of the insurers (4); with this qualification however, that an insurance effected upon cargo charged with bottomry to its full value is null and void, and such an insurance is only confined to the value of the cargo over and above the bottomry (5).

*g.* The ransoms of persons taken prisoners by the Turks (6).

*h.* Everything that is connected with trade, navigation, export, and import of goods, and voyages, and arising therefrom (7).

*i.* The value of provisions which are consumed during the voyage (8).

*k.* The profit expected from a certain transaction, provided that it is valued at a certain sum in the policy (9).

Ammunition of war is not included in insurances under the general denomination of wares and merchandise, nor gold, silver, precious stones and jewels, unless

(1) *Ordonn. Rott. Art. 26, Dordr. Art. 30, Amst. Art. 15.*

(2) *Ordonn. Rotterd. Art. 26, Dordr. Art. 30.* But these are excepted by the *Ordonn. Amst. Art. 13, & Middelb. Art. 6.*

(3) *Ordonn. Rott. Art. 26, Dordr. Art. 30, Amst. Art. 19-21, & Ampl. 1756, Art. 21.*

(4) *Bynkershoek, Quæst. Jur. Priv. L. 4, C. 16, p. 658, seqq.*

(5) *Ordonn. Amst. Art. 21, & Ampl. 1756.*

(6) *Ordonn. Rott. Art. 26, Dordr. Art. 30, Amst. Art. 14.*

(7) *Ordonn. Rotterd. Art. 26, Dordr. Art. 30.*

(8) *Ordonn. Middelb. Art. 3, Amst. Art. 7.* But the contrary is found in the *Ordonn. Rotterd. Art. 24, Dordr. Art. 31.*

(9) *Ordonn. Amst. Art. 17.*

they are expressly stated in the policy as such (1). The ships, merchandise, or other goods of enemies, may not be insured (2). In some places the ship, with all its appurtenances, may be insured for its whole and full value (3); in others only for seven-eighths of the value (4). The insurers are not liable to pay for damage if it does not exceed three per cent. (5). The shipowners may not insure against the barratry (lit. *knavery*) of the master, because they themselves appoint him; but they may against his negligence, and also against the barratry of the crew, and of the masters who, upon the death of those appointed, or of other reasons, are placed in command in foreign parts, and without the knowledge of the shipowners. This, however, does not apply to the freighters and shippers, who may insure against the barratry and negligence of masters and mariners (6). The lives of human beings are not the subject of any insurance, but their civil liberty is (7).

## SECTION III.

II. *Persons qualified to insure.* Insurance brokers (8) <sup>Who may insure.</sup> may not personally, or through others, bind themselves

(1) *Ampl. Ordonn. Middelb. Art. 3, Ordonn. Amst. Art. 10, Rotterd. Art. 41, Dordr. Art. 43.*

(2) *Bynkershoek, Quæst. Jur. Publ. L. 1, C. 21.*

(3) *Ordonn. Amst. Art. 7, Dordr. Art. 34.*

(4) *Ordonn. Rotterd. Art. 31.*

(5) *Ordonn. Rott. Art. 44, Dordr. Art. 46, Amst. Art. 22 & 34.*

(6) *Ordonn. Rott. Art. 42 & 43, Dordr. Art. 44 & 45; Bynkershoek, Quæst. Jur. Priv. Lib. 4, C. 4, p. 553, seqq.*

(7) *Bynkershoek, Quæst. Jur. Priv. L. 4, C. 1, p. 526, seqq.; Pothier, C. 3, Sect. 1, Art. 3.*

(8) For their duties and fees see the *Ordonn. Middelb. Art. 9 & 10, Amst. Art. 38 & 39, Rott. Art. 76-79, Dordr. Art. 76-79 & 81.*

as *insurers* (1). The commissioners and secretary of the Chamber of Insurance are also prohibited from doing this (2). No special authority is required to effect an insurance, but a general authority is sufficient for this purpose: whence even factors are qualified to effect an insurance (3). A policy of insurance may be underwritten by several insurers, even at different times; and they are all equally liable to pay the loss in proportion to the amount for which each has subscribed (4). They are therefore never responsible for the insolvency of their co-underwriters, but the assured is at liberty to effect a fresh insurance in place thereof (5). Since they are not joint debtors (*correi debendi*), the assured has the power to release some, and to hold the rest liable; he then bears the risk himself for the portion released (6).

## SECTION IV.

Against what  
risk.

III. *A risk to which the thing insured can be exposed.* This risk must be uncertain and unknown to both the contracting parties. Therefore an insurance is entirely void if one of them knew that the goods insured had *either* safely arrived at their place of destination *or* were lost (7). Nay, it is even sufficient if the assured *could* have known of this loss, unless he and the person

(1) *Ordonn. Rott. Art. 80, Amst. Art. 39.*

(2) *Bynkershoek, Quæst. Jur. Priv. L. 4, C. 26, n. 2, p. 739.*

(3) *Ibid. d. l. C. 1, p. 524.*

(4) *Ordonn. Amst. Art. 24, Rotterd. Art. 59 & 70, Dordr. Art. 68 & 72.*

(5) *V. d. Keessel, Thes. 764.*

(6) *Ibid. d. l.*

(7) *Bynkershoek, Quæst. Jur. Priv. L. 4, C. 26, n. 6.*

who effected the insurance for him declare upon oath that they did not know of it (1); which oath is, however, only allowed in some places in the case of insurances effected *lost or not lost* (*upon good or bad news*) (2). However, the insurer may take upon himself to prove that the assured was aware of the loss (3). If this is shown, the latter is criminally punishable, besides losing his right of action (4). Goods or ships already at sea may be insured, provided that this fact and the *date* of their departure are set out in the policy, or that the assured did not know of this, and has said so in the policy (5). Under *perils of the sea* is comprehended everything caused by the winds, storms, or bad weather, but not through the ignorance of the master or pilots \* (6), nor the damage caused to the ship or cargo through an internal defect (7).

## SECTION V.

IV. *The determination of the amount which the insurer binds himself to pay in case the goods insured are lost or suffer damage.* This sum is usually fixed by the policy; but the insurers may also bind themselves to pay the value which the goods may be found to be of upon appraisement (8). This amount may not

The amount  
to be paid by  
the insurer.

(1) *Ordonn. Amst. Art. 12.*

(2) *Ordonn. Rott. Art. 35-37, Dordr. Art. 38 & 39.*

(3) *Bynkershoek, Quæst. Jur. Priv. L. 4, C. 16, p. 653.*

(4) *Ordonn. Rott. Art. 39 & 40, Dordr. Art. 42.*

(5) *V. d. Keessel, Thes. 725-27.*

(6) *Barels, Adviesen over den Koophandel, 1 D. Cons. 13.*

\* "Ship's company," in Hery's translation, reading *Bootslieden* instead of *Lootslieden*.—TR.

(7) *V. d. Keessel, Thes. 759.*

(8) *Pothier, C. 1, Sect. 2, Art. 3, § 1, n. 75.*



exceed the actual value of the goods insured, but in some cases must even be below it (1). If the goods are found to be insured for more than their value, the insurers are not liable to pay more than the true value of the damaged or lost goods, or of the damage caused to them, each in proportion to the sum for which he has subscribed (2).

## SECTION VI.

Premium.

V. *The premium of insurance.* Although this ought also to be proportioned to the greatness of the risk which the insurer takes upon himself, the stipulation contained in the contract of insurance creates such a binding obligation between the parties that the insurer is not permitted to complain of prejudice in this respect (3). If the goods insured are not sent off, or a less quantity in value is put on board, or the sum insured exceeds the value of the goods, the premium of insurance which has been paid may be claimed back (*restorno*), leaving however *one half per cent.* to the insurer; but if the goods have already been loaded from the shore into boats or lighters, to be conveyed to the ships, and the projected voyage is then stopped, the deduction is *one per cent.* (4). If an insurance is effected in the same policy, not only upon the cargo despatched, but also upon the return cargo (*de retour*) the assured may claim the repay-

(1) De Groot, *Intro.* 3 B. 24 D. § 4, n. 7 & 8; Bynkershoek, *Quæst. Jur. Priv. L.* 4, C. 6, p. 569.

(2) *Ordonn. Rott. Art.* 70, *Amst. Art.* 23; Bynkershoek, *d. l.* p. 570.

(3) Bynkershoek, *d. l. L.* 4, C. 5, p. 564.

(4) *Ordonn. Amst. Art.* 23, *Verzam. van Casuspos. Cas.* 20.

ment of the premium paid on this account if the ship takes in no cargo upon her return (1). All premiums of insurance must be punctually paid upon the signing of the policy; and if the insurer gives the broker credit for it, he has his remedy only against him, unless the assured has not himself paid the premium to the broker (2). The insurer has no right of hypothec upon the assured's goods for the premium; the broker only who has advanced the premium has a lien upon the policy (3). If a contract of insurance is concluded in time of peace for a very moderate premium, without inserting a clause providing for the case of war, and a war unexpectedly breaks out, there are weighty reasons for holding that the insurer is not entitled to demand an increase of the premium (4).

## SECTION VII.

VI. *The mutual agreement of the contracting parties contained in a written policy.* Although this transaction belongs to that class of transactions which are constituted by simple consent, and is valid although the premium has not yet been paid (5), yet the law provides that policies entered into verbally (*hand-polissen*), or acceptances of insurance, shall not be valid for more than fourteen days, and that within that time they must be reduced into writing on a

Policy of  
insurance.

(1) Barel, *Adviesen over den Koophandel*, 1 D. Adv. 19.

(2) *Ordonn. Amst. Art.* 37.

(3) *Bynkershoek, Quæst. Jur. Priv. L.* 4, C. 2, p. 538, *Ordonn. Amst. Art.* 39.

(4) Pothier, *C.* 1, *Sect.* 2, *Art.* 3, § 2, n. 83; Emerigon, *Chap.* 3, *Sect.* 4. *Tom.* 1, p. 70, & *suiv.*

(5) V. d. Keessel, *Thes.* 713 & 729.

properly stamped policy (1). All such conditions may be inserted in a contract of insurance as are not prohibited by law, and they must be strictly followed (2). If conditions are inserted which are forbidden by law they are void and invalid, even although the parties had renounced the law (3). The name of the ship must be expressed in the policy; at least it must be indicated in a clear manner (4). An alteration in the name, made *bonâ fide*, does not matter, provided that there can be no doubt as to its being the same ship (5). By the circumjacent places (*circumjacentiën*), mentioned in most policies, are meant not only the place of loading, but also the harbours and sea-ports, and moreover all the buoys, beacons and similar signs, until the vessel has sailed past them, but no distant places (6). Several policies may be underwritten for one and the same insurance. If, taken together, they exceed the value of the thing insured, the policy prior in date remains in force, and the liability to return the premium (*restorno*) falls on the later policy (7).

## SECTION VIII.

Obligations of  
the insured.

If the goods insured are lost or suffer damage, and thus the event takes place upon which the contract

(1) *Publ. Holl.* 13 Nov. 1773, *G. P. B.* 9 D. p. 1341. *Ordonn. op 't Klein Zegel*, 28 Nov. 1805, *Art.* 74.

(2) *V. d. Keessel*, *Thes.* 730 & 731.

(3) *Ibid.* *Thes.* 732.

(4) *Bynkershoek*, *Quæst. Jur. Priv. L.* 4, *C.* 12, p. 618, *seqq.*

(5) *Ibid.* *d. l. C.* 11, *pp.* 610–12.

(6) *Ordonn. Amst. Art.* 4; *Bynkershoek*, *d. l. L.* 4, *C.* 6, p. 571, *seq.* & *C.* 10, *pp.* 601–603.

(7) *Ordonn. Amst. Art.* 24.

of insurance comes into operation, various obligations, both on the part of the assured and of the insurer, arise, which deserve to be shortly mentioned. And, firstly, those of the *assured*, as the person claiming the damages.

1st. He is bound to give notice, through a broker or some other public person—e.g. at Amsterdam through the secretary and Messenger of the Chamber of Insurance—to the insurer, immediately and without delay, and, if required, to give a copy of all advices he has received of the insured ship or goods with regard to the disasters, arrests or damages which have happened to them. If the assured neglects to do this he is liable to make good the costs, losses and interest caused thereby (1).

2nd. If the ship or goods insured are totally lost, or are so much destroyed that the insurer may be called upon to pay the whole of the sum underwritten, the assured is bound, before he can claim compensation, to *abandon* the ship or goods, and to renounce all right therein in favour of the insurer (2). The abandonment is made by a notice in writing served by the Messenger of the Board of Maritime Causes (3). If the ship is lost or has become unnavigable, or the goods are lost, spoilt, captured or otherwise lost to a certainty, beyond hope of recovery, the abandonment may be made immediately (4); but if there is still a hope of getting the arrested ship or goods released again, the abandon-

(1) De Groot, *Intro.* 3 B. 24 D. § 14, *Ordonn. Amster.* 1744, *Art.* 36, & 1756, *Art.* 36.

(2) Pothier, *C.* 3, *Sect.* 1, *Art.* 1, § 3, *Ordonn. Rott. Art.* 60.

(3) *Ordonn. Rott.* 61.

(4) De Groot, *Intro.* 3 B. 24 D. § 13, *Ordonn. Rott. Art.* 62, *Dordr. Art.* 64.



ment may be delayed for some time after notice has been given to the insurer : to wit, *six months*, if it has happened within *Europe*, and also as far off as *Barbary and the Canary Islands* and off there ; and *one year* if it has happened further off. The insurer is meanwhile bound to give proper security if required by the assured (1). If the vessel in which the insured cargo is loaded is detained or becomes unnavigable while abroad, the goods may be trans-shipped for account of the insurer into another vessel, and conveyed by her to the place of their destination ; but if the damage to the ship is of little consequence, the assured must wait for the time necessary for her repair (2).

3rd. The assured is bound, upon making the abandonment, to disclose all other insurances effected by him, and the sums which he has taken up on bottomry upon the insured goods (3).

4th. He is bound to prove by proper evidence both the value of goods loaded and insured and the amount of the damage they have sustained (4). Although the value of the goods insured is fixed at a certain sum in the policy, it is not sufficient for the assured to confirm this statement upon oath, but its correctness must be proved by other evidence (5). The value of goods lost must be assessed at their invoice price, and that of the goods damaged, which have arrived at their place of destination, at the value which they would have fetched

(1) De Groot, *d. l.* § 12, *Ordonn. Amst. Art.* 26, *Rott. Art.* 64–66, *Dordr. Art.* 67 & 68 ; V. d. Keessel, *Thes.* 755.

(2) *Ordonn. Amst. Art.* 26, *Middelb. Art.* 15, *Rott. Art.* 53 & 54, *Dordr. Art.* 55.

(3) Pothier, *C.* 3, *Sect.* 1, *Art.* 1, § 4.

(4) *Ibid. d. l.* § 5.

(5) Bynkershoek, *Quæst. Jur. Priv. L.* 4, *C.* 17, pp. 663–65.

had they arrived there undamaged, without including in this calculation the freight and other expenses, which would have to be insured separately (1). If the goods arrive partly sound and partly damaged, not only the damaged goods, but also the sound goods, are included in calculating the damage, so that the loss is estimated at such a percentage at which all the goods taken together were diminished in value, and thus the profit upon the sound goods is set off against the loss sustained upon the damaged goods (2).

## SECTION IX.

On the part of the insurer his obligations consist principally in the following :—

Obligations of  
the insurer.

1st. If the goods insured are totally lost, or can be considered as lost, the insurer is bound, upon the abandonment of the goods, to pay the sum for which he subscribed the policy (3). If not the slightest tidings are received of the insured ship or goods they shall be deemed to be lost, and the assured is entitled to abandon after the expiration of one year and six weeks if they were despatched to Europe or Barbary, and of two years if their destination was further off (4).

2nd. If the insured goods are not totally lost, but are damaged by one of the disasters, the risk whereof the insurer has taken upon himself, he is bound to make good the damage, each in proportion to the amount he has underwritten (5), because by *loss*, in the

(1) V. d. Keessel, *Thes.* 739.

(2) *Verzameling van Casus-Positiën*, *Cas.* 5, p. 43, *seqq.*

(3) Pothier, *C.* 3, *Sect.* 1, *Art.* 1.

(4) De Groot, *Introd.* 3 B. 24 D. § 10, *Ordonn. Rott. Art.* 67.

(5) Pothier, *C.* 3, *Sect.* 1, *Art.* 3.

language of insurance, is meant not only the *destruction* but also the *damage* of the goods (1).

The loss by which the goods are lost or damaged includes, if it happens at sea, bad weather, fire, the enemy, pirates, restraints by the authorities; also everything that happens to the ship or goods through the barratry or negligence of masters, mariners or others, and moreover everything contemplated or not contemplated, usual or unusual, as the policies usually have it (2). It is clear that the insurer is not liable if the insured goods are either totally or partially spoilt, deteriorated or damaged by an intrinsic defect without any external cause; just as is the case with respect to an internal defect of the vessel (3). For the same reason the insurer is not liable to make good the damage which the vessel of a Greenland whaler has sustained from the ice, provided she has arrived safely in port (4). The risk of the loss which must be made good by the insurer *begins* to run for his account from the time that the insured goods are brought to the quay or shore to be loaded from hence into the ship by which they are to be carried over the sea, or also into boats or lighters, to be conveyed thereby to the ship; and *terminates* when the vessel, with its appurtenances, has arrived at her place of destination, and has, without restraint and safely, discharged her whole cargo (5).

(1) *Ordonn. Amster. Art. 35, Rott. Art. 70.*

(2) *De Groot, Intro. 3 B. 24 D. § 7; Ordonn. Rott. Art. 42.*

(3) *V. d. Keessel, Thes. 759.*

(4) *Barels, Adviesen over den Koophandel, 1 D. Adv. 25, p. 138.*

(5) *De Groot, Intro. 3 B. 24 D. § 8, Ordonn. Rott. Art. 46 & 47, Amst. Art. 5; Bynkershoek, Quæst. Jur. Priv. L. 4, C. 2.*

## SECTION X.

“That insurers are more ready to receive premiums than to pay losses, and are usually very ingenious in avoiding the latter,” is a remark made long before our time (1); but the above-mentioned definitions, however, show that there may be several cases in which the insurer has a legal ground of defence against the claim of the assured. It is thus of importance to enumerate shortly the principal of these cases.

Exceptions to  
these obligations.

a. If the damage for which payment is claimed was caused not by an external cause, but, e.g., by some internal defect of the ship or goods (2), or is so trifling as not to be subject to compensation: e.g. if it does not amount to three per cent. of the value (3).

b. If the sum insured exceeds the value of the interest in the ship, the result of which is that this sum may be reduced to the actual value of that interest; nay, the assured even loses his action if he did it wilfully and fraudulently (4).

c. If the insured ship has through the act of the master, although without the knowledge of the joint-owners or owners, deviated from her course defined in the policy, because this vitiates the policy (5). In the case of insurance of goods, if the master has deviated from his course without the knowledge of the assured,

(1) Bynkershoek, *d. l. C. 3*, p. 545.

(2) Vide *supra*, pp. 457, 464.

(3) V. d. Keessel, *Thes.* 760.

(4) Pothier, *C. 3, Sect. 1, Art. 1*, § 6, n. 156.

(5) Barels, *Adviesen over den Koophandel*, 1 D. Adv. 21, pp. 123-25; *Ord. Amst. Art. 6, in fin.*



the insurer is not released unless the goods insured belong to the shipowners themselves (1). The master, however, always remains liable; and the insurer, upon payment, may demand cession of action against him (2). The assured may not order the master to enter any other harbour than that mentioned in the policy, otherwise the insurance would become void, and the insurers would not be liable (3). This order or knowledge of the assured must be proved by the insurer, and the oath of the assured, to purge himself, may also be allowed in this case (4). By *deviation from the course* is meant not only if the ship takes an entirely different route, or touches at other ports before arriving at her place of destination (5), but also if she sails past the port where the insured goods must be discharged without touching there, and continues her voyage with her entire cargo which was destined for some more distant place, and is lost during this further voyage (6). A deviation from the course occasioned by necessity does not affect the action of the assured (7).

*d.* If the goods on their arrival at the place of destination are not discharged within the proper time; which time is fixed at *twenty-one* days at *Amsterdam* and *fourteen* days at *Rotterdam* and *Dordrecht* (8).

(1) *Ordonn. Amst. d. l.*; Bynkershoek, *Quæst. Jus. Priv. L. 4, C. 8.*

(2) *Ordonn. Rott. Art. 52, Dordr. Art. 54.*

(3) De Groot, *Intro. 3 B. 24 D. § 11, n. 25.*

(4) Bynkershoek, *d. l. L. 4. C. 16, p. 562, seq.*; *C. 7, p. 582*; *C. 8, p. 585*; *C. 16, p. 657.*

(5) *Ibid. d. l. L. 4, C. 16, p. 655.*

(6) *Verzam. van Casus-Posit. Cas. 12.*

(7) Bynkershoek, *d. l. C. 9, p. 591, seqq. & p. 596.*

(8) De Groot, *Intro. 3 B. 24 D. § 9*; *Ordonn. Amst. Art. 5, Rott. Art. 49, Dordr. Art. 49 & 51.*

e. If the abandonment is not made within the proper time (1).

As a rule, in dealing with disputes arising upon insurances, it must be borne in mind that the contract of insurance is a transaction in which *bonâ fides* must prevail, and in which nothing that savours of fraud, either on the part of the insurer or of the assured, can be tolerated (2), to such an extent that the party who acts *malâ fide* in this agreement is liable for all expenses, damages and loss of profit, besides being punished by the Crown (3).

## SECTION XI.

All disputes arising upon insurances must be dealt with before judges specially appointed for that purpose. Procedure in this branch of law. Thus at *Amsterdam* there are the *Commissioners of Insurances* (4); at *Rotterdam* and at *Dordrecht* the *Chamber of Maritime Causes* (5). This is even carried so far that in these cases a general submission to the jurisdiction of all courts is not recognised, and the privileges of minors and widows cease (6). If the contracting parties have by the policy expressly subjected themselves to the jurisdiction of the *Chamber* it must be followed, and the insurers, though residing

(1) Vide *supra*, p. 461; Pothier, *Chap. 3, Sect. 1, Art. 1, § 6*, n. 153.

(2) Pothier, *C. 3, S. 3*; Emerigon, *C. 1, § 5*.

(3) De Groot, *Intro. 3 B. 24 D. § 20*; Zurek, in *Cod. Bat. voc. Assurantie*, § 23, n. 3.

(4) *Ordonn. Amst. Art. 43 & 44*; *Ord. op 't Proced. aldaar van 1779, C. 1, Art. 4*.

(5) *Ordonn. Rott. Art. 1, 23 & 24, Dordr. Art. 5 & 6*.

(6) *Nad. Ampl. Instr. van 't Hof. van 1744, Art. 8*.

at different places, cannot be summoned before the High Court in the first instance (1). An appeal lies from the judgments of the Commissioners of Insurances to the College of Schepenen (2), and from the latter to the High Court.

The action against insurers must be instituted within a *year and a half*, if the disaster happened in Europe or Barbary ; but if it happened further away, within *three years* ; which periods must be calculated from the day upon which the disaster happened (3). Against the lapse of this time no relief should be granted unless for reasons founded on law (4).

If a properly signed policy is proved to the court, and it is proved that three months before due notice of the loss sustained had been given to the insurers (which time the law allows the insurer to provide for payment) (5), provisional judgment is given against the insurer to pay the amount claimed (6). Although the premium was not punctually paid by the broker when the policy was signed, as by law it should have been (7), yet no higher interest can be calculated than the ordinary interest of *four per cent.* (8). All insurers are also bound, if judgment is given against them, to satisfy it immediately, and on failure thereof

(1) *Resol. Holl.* 12 *Julij*, 1736, *G. P. B.* 7 *D.* p. 933.

(2) *Ordonn. Amst. Art.* 49.

(3) De Groot, *Introd.* 3 *B.* 24 *D.* § 21 ; *Ordonn. Amst. Art.* 30, *Rott. Art.* 69, *Dordr. Art.* 71.

(4) Bynkershoek, *Quæst. Jur. Priv. L.* 4, *C.* 14, p. 639, *seq.*

(5) De Groot, *Introd.* 3 *B.* 24 *D.* § 13, *Ordonn. Amst. Art.* 28. But at Rotterdam and Dordrecht the time is limited to one month. *Ordonn. Rott. Art.* 68, *Dordr. Art.* 70.

(6) *Ordonn. Amst. Art.* 47.

(7) *Vide supra*, p. 459.

(8) V. d. Keessel, *Theas.* 767.

to pay interest at *eight* per cent. per annum, from the date of the judgment until the actual satisfaction (1).

## CHAPTER VII.

### ON THE LAW OF BILLS OF EXCHANGE.

#### SECTION I.

“THE circulation of bills of exchange is in commerce what the circulation of the blood is in the human body. Just as the body is nourished by this circulation, and languishes and perishes when it stops, so no commerce can flourish if the circulation of bills of exchange is taken away” (2). No wonder therefore that bill transactions. have such a very old origin. Among the Romans even some traces may be found (3). Some authors have maintained that the use of the contract of bills of exchange and of bills of exchange is derived from *Lombardy*, and that the *Jews* who settled there were the inventors. Others attribute its invention to the *Florentines*, when, driven out of their own country, they settled down at *Lyons* and other towns. There is nothing certain about this matter except that bills of exchange were already in use in the fourteenth century (4).

With respect to the law of bills of exchange there are few laws in our country, and, above all, none that

(1) *Ordonn. Amst. Art.* 56; V. d. Keessel, *Thes.* 767.

(2) Leyser, *Medit. ad Pand. Tom.* 7, *Specim.* 531, *Medit.* 2.

(3) Cicero, in *Epist. ad Attic.* XII. 24, XV. 15, & *ad div. II.* 17, *III.* 5.

(4) G. F. von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrechts* (Gott. 1797).



can be considered as good and perfect (1). We must therefore content ourselves with reasons deduced from the nature of this transaction, with the authority of authors who have treated of it, and with the laws of foreign nations (2).

## SECTION II.

Bills of exchange in general.

By a *contract of a bill of exchange* is meant a transaction by which I give you, or bind myself to give you, a certain sum, at a certain place, for and in exchange of a sum of money which you bind yourself to pay to me at another place (3). In order to carry out this contract, and to bring it into operation, a *bill of exchange* is drawn, i.e. a letter, framed in a certain form defined by law, by which you request your correspondent at a certain place to pay me or my order, at that place, a certain sum of money in exchange for a sum of money or the value thereof, which you received from me here, either in cash or in account (4).

(1) See on this point the *Aanhangsel van Wisselwetten*, at the end of Heineccius, *Wisselregt*, pp. 619-639.

(2) Among the authors on this subject who are most to be recommended may be included J. C. Heineccius, *Grondbeginselen van het Wisselregt*, door K. K. Reitz (*Middelb.* 1774); J. Phoonsen, *Wisselstijl tot Amsterdam* (*Rott.* 1755, 2 vols. in 8vo); R. J. Pothier, *Verhand. van het Wisselregt* (*Leyd.* 1801); J. du Puy, *l'Art des Lettres de Change* (*Amst.* 1792); J. L. E. Putman, *Grundsätze des Wechsel-rechts* (*Leipz.* 1795); besides those who have written upon the laws of bills of exchange of various countries.

(3) Pothier, *Intro.* § 2.

(4) *Ibid. d. l.* § 3.

### SECTION III.

Besides bills of exchange, there are some other instruments in use in commerce which do somewhat resemble bills of exchange, but differ from them materially. Of this nature are—

Notes of a similar nature.

1st. *Exchange notes* (*Wissel-biljetten*), by which is meant such written obligations by which a person binds himself to another, *either* to pay him a certain sum as the price of bills of exchange which he has delivered to him, *or* to give him bills of exchange upon a certain place for the value which he has paid him for them (1). These exchange notes are sometimes also drawn “to order,” and can then be negotiated or endorsed just like bills of exchange (2).

2nd. *Notes payable at a certain residence*: that is such written obligations by which I bind myself to pay you or your order a certain sum, at a certain place, by means of my correspondent, in lieu of the sum or value which I have received here from you, or am still to receive (3).

3rd. *Notes to order*: that is, such notes by which a person promises another to pay something to him or to his order, to whom he indorses the note on the back thereof. They differ from other written obligations in this respect, that if they are made payable to a particular person they require a deed of transfer for their assignment, and that such an assignor does not guarantee that payment will be made by the debtor, as is the case in indorsements; wherefore also the

(1) Pothier, *Inleid.* § 4, & 2 *Deel*, §§ 2–4.

(2) *Ibid.* 2 *Deel*, §§ 5–8.

(3) *Ibid.* 2 *Deel*, § 9.

institution of actions arising out of written obligations transferred by deed is not subject to any limitation of time (1).

4th. *Notes to bearer*: that is, written obligations, containing a promise to pay a certain sum to the bearer of the note, without any description of the person of the creditor who gave value for it (2). Every holder can demand the payment thereof, unless it be shown that he obtained it *malâ fide* (3). If the note is not simply payable to *holder or bearer*, but to the *lawful holder or bearer*, he must show that he became the holder of the note by a lawful title (4).

5th. *Assignations*: that is, such notes by which I request some person to pay a certain sum on my account to a third person, generally my creditor (5). This transaction includes a contract of mandate—

*a.* From the drawer to the drawee, to pay the sum mentioned in the *assignation*, for him to his creditor; and

*b.* From the drawer to his creditor, to receive the sum mentioned in the assignation from the drawee, with it to pay himself the debt due to him (6). They differ in several respects from bills of exchange: e.g. the holder of the assignation is not bound to sue the drawee, not even to apply to him within a fixed time for payment. If payment is refused, it suffices for the holder to return the assignation given to him to his debtor, and he is entitled to demand payment from him of the debt due by him, just as if he had not

(1) Pothier, *Inleid 2 Deel*, §§ 10–16.

(2) *Ibid.* 2 *Deel*, § 18.

(3) De Groot, *Intro.* 3 *B. 5 D.* § 6; V. d. Keessel, *Thes.* 525.

(4) Bynkershoek, *Quæst. Jur. Priv. L.* 2, *C.* 11.

(5) Pothier, 2 *Deel*, § 19.

(6) *Ibid.* *d. l.* § 21; V. d. Keessel, *Thes.* 841.

given the assignation to the holder. They may be made between persons all residing at the same place, whereas bills of exchange are always drawn at one place, and payable at another. Although they are accepted, they do not give the right of proceeding by the summary law of bills of exchange.\* The maker of an assignation is not liable upon non-payment in the same manner as the drawer of a bill of exchange. The holder of an assignation has only his remedy against the last endorser, and not against all the endorsers, like the holder of a bill of exchange (1).

6th. *Letters of credit*: by which a merchant or a banker requests his correspondent at another place to pay the person mentioned in the letter as much money as he states he requires (2).

#### SECTION IV.

Bills of exchange, such as are in use in commerce [because the so-called *dry* or *own* bills of exchange (*drooge of eigene*) are merely acknowledgments of debt drawn in the form of bills of exchange, and in which the maker is himself the person who binds himself to make the payment (3)], are of various kinds:—

Various kinds  
of bills of  
exchange.

1st. Bills containing the words, *value received*, without the nature of the value being expressed.

2nd. Bills in which the nature of the value is expressed: e.g. *value received in cash* or *value received in merchandise*.

\* "Paraat Wisselregt," vide *infra*, p. 448.

(1) Pothier, *d. l.* §§ 23–29; V. d. Keessel, *Thes.* 838–852.

(2) *Ibid.* *d. l.* § 30.

(3) Phoonsen, *Wisselstijl*, C. 35; Heineccius, *Wisselregt*. 2 Hoof. §§ 1–6, 20 & 21; Putman, *Grundsätze des Wechsel-rechts*, 2–4 Hauptst.



3rd. Bills containing the words, *value to myself* (*waarde in mij zelven*). These are drawn to the order of the drawer himself, who, as soon as the broker has found some one who will pay the value of the bill, endorses it to that person, and with the words, *value received from him in cash*, whereupon the bill first really obtains the force of a bill of exchange.

4th. Bill containing the words, *value in account*. In this case I am bound to set off the money I receive by means of this bill against the debt due to me by the person who gave me the bill (1).

5th. Bills payable *at sight*, that is, payable as soon as the holder presents them.

6th. Bills payable a certain number of days *after sight*. In these bills the time of payment runs from the day upon which they were presented to the drawee, and accepted by him.

7th. Bills payable on a certain day mentioned.

8th. Bills payable at one, two, or more *usances*. By *usage* is meant the time which it is usual in a particular country to allow for the payment of bills of exchange (2): e.g. in *France* the *usage* is fixed by law at *thirty days*, so that a bill drawn there at *a usage and a half* must be paid *forty-five* days after date, because one must calculate from that time, unless the bill contains the words, *so many days after sight*.

9th. Bills payable at certain dates of annual fairs (3).

(1) According to some *Ordinances on bills of exchange*, the statement in the bill of what the value (*valuta*) consists is necessary, according to others, not. Heineccius, 4 *Hoofds.* § 14; Putman, 2 *Hauptst.* § 13.

(2) Phoonsen, *C.* 14, § 10.

(3) Compare on all these points Pothier, 1 *Hoofds.* §§ 3-11.

# SECTION V.

There are usually *four* parties to a bill transaction ; The parties necessary to a bill of exchange.  
*three* at least are necessary :—

1st. The *drawer*, who draws the bill.

2nd. The *payee*, who gives, or promises to give, the value of the bill to the drawer.

3rd. The *drawee*, to whom the bill is addressed, and who must pay it. If he has bound himself by accepting and signing the bill to pay it, he is called the *acceptor*.

4th. The *holder*, who must receive the amount of the bill (1).

It may happen that the payee and the holder are the same person, in which case there are not more than three parties to this transaction (2). Other parties may also appear on a bill: e.g. *indorsers*, that is, persons to whom the owner of the bill has assigned his right therein, by a signature upon the back (*in dorso*) of the bill (3); outside *acceptors*, who accept to pay *for the honour* of the drawer, or one of the indorsers (4); *sureties* for the drawee. This guarantee is called *aval* (5).

# SECTION VI.

The following points are chiefly essential to a bill of exchange: Requisites of a bill of exchange.

1st. Mention must be made in it of *three* persons: of

(1) Pothier, 2 *Hoofds.* § 1; V. d. Keessel, *Thes.* 574.

(2) *Ibid. d. l.* §§ 2-5.

(3) *Ibid. d. l.* §§ 6-8.

(4) *Ibid. d. l.* § 9.

(5) Heineccius, 3 *Hoofds.* § 26; Pothier, 2 *Hoofds.* § 10, & 3 *Hoofds.* § 20.

him who draws the bill, of him upon whom it is drawn, and of him to whom it is payable.

2nd. There must be a drawing over from one place to another: i.e. a person must give at one place in order to receive at another (1).

3rd. It is usual to frame a bill payable to a certain person named, *or to his order*. If this is omitted, the bill cannot be transferred to another by mere indorsement (2).

4th. The time of payment must be expressed in it: e.g. *either* on such a day, *or* at sight, *or* at so many days after sight, *or* at one or more usances (3).

5th. The mention of value received, with a statement (according to some *ordinances*) of what this value consists (4). Without this acknowledgment of value received, it would not be a bill of exchange, but a mere assignation (5).

6th. It is most prudent, in order to prevent forgery, to express the amount for which the bill is drawn, not in figures, but in letters (6).

The drawer who has drawn the bill of exchange is usually accustomed to give notice thereof to the drawee by a letter of advice. Sometimes, however, a merchant draws bills of exchange upon his correspondent without sending him any letter of advice, inserting in the bill: *pay without further advice*: which most frequently happens when the amount is not of

(1) Pothier, 3 *Hoofds.* § 1, & 4 *Hoofds.* § 6.

(2) Phoonsen, *Cap.* 9, § 6; *Verzam. van Casuspos. Cas.* 8, p. 88.

(3) Pothier, *d. l.* § 3; V. d. Keessel, *Thes.* 605.

(4) Vide *supra*, p. 474; V. d. Keessel, *Thes.* 598.

(5) Pothier, *d. l.* § 5.

(6) Ibid. *d. l.* § 6.

great consequence (1). Sometimes several copies of one and the same bill are made, especially if it is drawn upon distant countries. These are called the *first*, *second*, or *third*, bill of exchange, and these words are added therein : *the others being unpaid* (2).

## SECTION VII.

The bill of exchange being payable, as is usually the Indorsement. case, to a person named *or his order*, the owner of the bill has the power to assign his right therein to another person, by nominating another person upon the back of the bill in his stead to receive payment for him. This assignment is called an *indorsement*, the assignor the *indorser*, and the assignee the *indorsee* (3).

In order to render such an indorsement an assignment of the right to the bill, it is necessary for the indorser to acknowledge thereby that he has received the value from the indorsee: e.g. *for me to N. N. value received*, or *value in account*. If this is not added to it, the indorsement is only a mere order to the person named therein to receive payment of the bill as his mandatory, and to account to him for it. Such an indorser is therefore entitled to receive payment, but not to sue for it (4). It is required by several ordinances upon bills of exchange that the indorsement should be *dated*, and it is forbidden to make it *in*

(1) Heineccius, 4 *Hoofds.* § 16; Du Puy, *Chap.* 4, *n.* 5 & 6; Pothier, *d. l.* § 7.

(2) Pothier, *d. l.* § 8; Phoonsen, *C.* 5 & 15, & *volgg.*; *Verzam. van Casus-pos. Cas.* 2.

(3) Heineccius, 2 *Hoofds.* § 7.

(4) Pothier, 2 *Hoofds.* § 7, & 3 *Hoofds.* §§ 9 & 11.



*blank*. However wise and prudent these laws may be, they have, however, not been generally adopted by us (1).

## SECTION VIII.

Acceptance.

The person upon whom a bill is drawn must, when it is presented to him, state whether he undertakes the payment thereof; if he is willing to do so he writes *accepted* at the bottom of the bill and signs his name to it (2). If a bill is drawn payable some days after sight, and the drawee writes the word *seen* thereon and signs it, this is held to be an acceptance. If he is not willing to do so, he must write on the bill, *seen without acceptance* (3). The acceptance must be unqualified, without any proviso being added, and for the same sum and at the same time which is contained in the bill. In default of any of these requisites, the bill may be protested (4). A merchant is bound to accept a bill drawn by his factor, provided it be not drawn in his own name (5).

## SECTION IX.

Contract between the drawer and the payee.

Although there is a great controversy as to the nature of the transaction under which the contract of exchange must be classed, yet the matter seems to be very simple :

The payee, or the person who gives the value, *buys* or (to speak perhaps more accurately) *exchanges* the

(1) Pothier, *d. l.* § 10; Heineccius, 2 *Hoofds.* § 11.(2) Ibid. *d. l.* § 13; V. d. Keessel, *Thes.* 618.(3) Heineccius, 4 *Hoofds.* § 26; Pothier, *d. l.* § 15.(4) Pothier, *d. l.* §§ 17-19.(5) *Costum. van Antw. C.* 55, *Art.* 1; De Groot, *Intro.* 3 *B.* 13 *D.* § 4; Phoonsen, *C.* 10, *n.* 5.

money which he has in this place, or which he binds himself to give the drawer here, for or as against the money which the drawer binds himself to pay to the drawee at another place, by means of a bill of exchange upon that place (1). Since the value of money at the place where the drawee gives it, and at that place where the bill of exchange will have to be paid, sometimes differ by reason of the abundance or scarcity of the remittances of money to such place, the payee makes some deduction on this account. This is called the *rate of exchange* (2).

Just as a contract of *sale or exchange* takes place between the drawer and the payee, so a *contract of mandate* takes place between the drawer and the drawee (3). If the disputes arising out of bills of exchange are simply solved and settled according to the nature, rules, and consequences of these kinds of contracts, a fairly certain and successful result will generally be arrived at.

## SECTION X.

From the concluded contract of a bill of exchange there arise various rights and obligations, the enumeration of which is of the highest importance. And, first, on the part of the *drawer*. His principal obligation consists in this, that he will pay the payee by means of a bill of exchange, at a fixed time and place, the sum of money which he has given the payee, and

The contract of the drawer.

(1) Du Puy, *Chap.* 3, § 13, & *suiv.*; Pothier, 4 *Hoofds.* § 2.

(2) Phoonsen, *C.* 3; Pothier, 4 *Hoofds.* §§ 3-5.

(3) Pothier, *d. l.* § 42, & *volg.*

which the latter must receive\* in exchange for the money which he received here from the payee (1).

From the nature of this principal obligation it follows that the drawer is bound—

1st. To deliver the bill of exchange to the payee on payment of its value, unless he has given him credit for the payment of this value: e.g. until it shall appear that the bill is accepted, because he cannot then refuse to hand over the bill, although its value is not tendered to him (2).

2nd. To give security, if the bill, payable at a certain date, is not accepted by the drawee, that the bill will be met upon the due date; or otherwise to refund the value he has received and the costs (3).

3rd. To return to the payee or his order that which he has received for the bill, whether it be money, or whether it be merchandise given instead of money, if they are still in possession of the drawer (4).

4th. To make good the damages which the payee has suffered by reason of the bill not being paid by the drawee upon the due date (5). Under this compensation for damages is included—

*a.* The interest upon the money received from the payee from the date of the protest.

*b.* The costs of the protest.

*c.* The additional damages suffered: e.g. the ex-

\* Lit. "which he has given him to be received."—Tr.

(1) Pothier, 4 *Hoofds.* § 9; V. d. Keessel, *Thes.* 584.

(2) Pothier, *d. l.* §§ 11 & 12.

(3) Du Puy, *C.* 7, *n.* 7, & *C.* 10, *n.* 19; Phoonsen, *C.* 13, § 7; Heineccius, 6 *Hoofds.* § 4; Pothier, *d. l.* § 21.

(4) Pothier, *d. l.* §§ 13 & 19.

(5) Du Puy, *C.* 16, *n.* 3 & 19; Phoonsen, *C.* 20, *n.* 2; Heineccius, *Hoofds.* § 4; Pothier, *d. l.* § 13.

penses of the journey made by the person to whom the bill was delivered to the place where it was payable, in order to do his business there, but which he was unable to transact by reason of the non-payment of the said bill (1). Loss of profit cannot, however, be reckoned as damages (2).

d. The *re-exchange*, that is, the costs which the holder had to incur by reason of his being embarrassed by the non-payment of the bill, in drawing for this amount upon the drawer or a third person, and thus to provide himself with the necessary funds (3).

e. Everything which the payee had to pay to the person in whose favour he indorsed the bill (4); because the drawer is as much liable to the indorsers as to the payee, with whom they stand on an equal footing as regards their rights (5).

All these obligations fall upon the drawer as soon as the payee has paid him the value; because from that moment he may not withdraw from the transaction nor revoke his mandate to the drawee (6). Nor can he, when called upon by the payee, holder, or indorsee, even avail himself of the defence that he received no consideration for the bill (7).

## SECTION XI.

On the part of the *payee*, or person who gives the value, his principal obligation consists in this: that he <sup>Contract of the payee.</sup>

(1) Pothier, *d. l.* § 14.

(2) Ibid.

(3) Heineccius, 4 *Hoofdd.* § 45; Pothier, *d. l.* § 15.

(4) Pothier, *d. l.* § 18.

(5) V. d. Keessel, *Thes.* 593.

(6) Ibid. *Thes.* 580.

(7) Ibid. *Thes.* 599-603.



must pay the value of the bill of exchange, which is delivered to him by the drawer, and at the time of this delivery, and without waiting until it is accepted or paid, unless it was otherwise agreed upon (1). If, however, a great change should take place after the agreement was entered into in the pecuniary circumstances either of the person who drew the bill or of the drawee, the payee may demand security for the payment of the bill (2). He is bound to present the bill for payment to the drawee upon the due date, in order to have evidence of the refusal of payment, by means of the protest, and to give notice of this refusal to the drawer, so that the latter may take his measures against the drawee (3). This must, however, be limited to the presentation *for payment*; because the failure to present *for acceptance* does not vitiate the action of the payee against the drawer for damages (4). In bills of exchange drawn *payable at sight*, the payee is not quite so strictly bound as to the time of making presentment for payment to the drawee; however, he must not be guilty of inexcusable delay (5).

## SECTION XII.

Contract between the indorser and the indorsee.

As the transaction between the indorser and the indorsee (namely, in indorsements for value received) stands on the same footing as that between the drawer and the payee, that which we just now observed on

(1) Pothier, 4 *Hoofds.* § 23; V. d. Keessel, *Thes.* 583.

(2) *Ibid.* *d. l.*; V. d. Keessel, *Thes.* 579.

(3) *Ibid.* *d. l.* § 25; V. d. Keessel, *Thes.* 581.

(4) *Ibid.* *d. l.* § 26.

(5) V. d. Keessel, *Thes.* 582.

that point also applies here (1). If, therefore, payment of the bill is refused, and the bill is protested, the indorsee has not only an action in his own name against the last indorser who assigned the bill over to him, but he is in addition entitled to the actions which this indorser had against prior indorsers and against the drawer, which are deemed to have been ceded to him by the indorsement made in his favour (2). If the indorsement was not made for value received, and is therefore nothing more than a mere mandate (3), the indorsee is bound, to get the bill accepted, to go and receive payment upon the due date, to hand over the value to his indorser, or, in default of acceptance or payment, to have the protests made thereof; but he is not entitled to make any claim against the acceptor, drawer or other indorsers (4). In the last-mentioned case the indorser may also revoke his indorsement, which he is not at liberty to do if value has been given for the indorsement (5).

### SECTION XIII.

The *drawee* is bound to accept the bill drawn upon him, if he had previously, by letter or otherwise, consented to his being drawn upon; but without such previous permission he is not bound to accept the bill which the maker has drawn upon him of his own

Contract between the drawer and drawee.

(1) Pothier, *d. l.* § 30.

(2) Ibid. *d. l.* 31; V. d. Keessel, *Thes.* 592.

(3) Vide *supra*, p. 476.

(4) Pothier, *d. l.* § 33, & *volg.*

(5) Ibid. *d. l.* § 41.

accord (1). If he has once accepted the bill he cannot withdraw from it (2).

The *drawer*, on the other hand, is bound—

1st. To pay the acceptor, when he has fulfilled his mandate by payment, the sum which the acceptor advanced for him to meet the bill (3); unless the money had been previously transmitted to him by the drawer, or if he was indebted to the drawer for that amount or more (4); and—

2nd. To indemnify the acceptor for the damages which he has suffered by being sued by the holder, to whom he did not pay the bill, by reason of the drawer not transmitting the necessary funds (5).

The damages caused by a forgery in the bill cannot be recovered from any one but the forger; and if he cannot be found, the person who has dealt with him must bear the loss at once (6). If therefore the drawee has paid a bill in which the drawer's name was forged, he cannot sue the drawer; and if the amount was increased by a forgery, for not more than the actual amount (7).

#### SECTION XIV.

Payment for  
the honour of  
drawer or  
indorsers.

If the drawee refuses to accept the bill, or, having accepted it, refuses to pay it, and some other person

(1) Pothier, *d. l.* §§ 43-47; Heineccius, 6 *Hoofds.* § 6; V. d. Keessel, *Thes.* 616.

(2) Phoonsen, *Cap.* 10, § 27; Du Puy, *Chap.* 10, n. 2-4.

(3) V. d. Keessel, *Thes.* 589.

(4) Pothier, *d. l.* § 48.

(5) *Ibid.* *d. l.* § 49.

(6) J. Bondt, *Diss. de periculo damni ex falso, in lite is cambialibus commisso* (L. B. 1788); V. d. Keessel, *Thes.* 871-73; Pothier, *d. l.* §§ 50-55.

(7) V. d. Keessel & Pothier, *dd. ll.*

accepts or pays the bill for the honour of the drawer or one of the indorsers (1), such drawer or indorser is bound to refund him the money he advanced to meet the bill (2). The person who accepts in this way is bound, by virtue of the acceptance, to make payment like a drawee who has accepted, provided that cession of action was given him when he accepted them. But if the bill is already protested for non-payment, and it is paid by a third person (which is called *supra protest*) the latter has his remedy according to the law of bills of exchange, even without cession of action (3).

## SECTION XV.

The person who *accepts* a bill binds himself thereby to pay the amount stated in the bill upon the due date, and he is liable for damages on failure thereof (4). Under this damage is included, just as in the case of the drawer (5), the interest, the costs of protest, the additional damages, and the re-exchange (6). For the whole of this the acceptor is liable to the payee and all the indorsers, who, as the holder of the bill, sue him (7); and also to each of them *in solidum*, that is for the whole amount. Nor can he avoid payment upon the due date under pretext that the drawer had not

Contract of  
the acceptor.

(1) Du Puy, *C. 9, n. 5-7*.

(2) Pothier, *d. l.* §§ 64 & 65; V. d. Keessel, *Thes.* 607-14.

(3) Roseboom, *Recueil, C. 50, Art. 10 & 11*; Heineccius, 4 *Hoofdd.* § 9.

(4) De Groot, *Intro. 3 B. 13 D. § 9*; Heineccius, 6 *Hoofdd.* § 38.

(5) Vide *supra*, p. 480.

(6) Pothier, *d. l.* § 68.

(7) Heineccius, 3 *Hoofds.* § 17, & 6 *Hoofds.* § 5.



remitted to him the necessary funds, and had afterwards become bankrupt (1), for all this does not in the least affect the holder. After the due date a short and additional period is allowed the acceptor for payment, which is called *days of grace*, and which in this country usually consists of six days (2). Upon payment being made, and not before, the bill is delivered up to the acceptor (3). Payment must be made by the acceptor at the time stated in the bill, and not before; at any rate, not without the full consent of the holder (4).

## SECTION XVI.

Contract of  
the holder.

The principal obligation of the *holder* consists in this, that upon the due date of the bill he must repair with the bill to the drawee (or acceptor) \* in order to receive payment thereof (5). In case payment is refused, he must prove the refusal by certificate of protest, and must immediately give notice thereof to the drawer, if he wishes to be indemnified by him (6).

The holder is not at liberty to enter into any agreement with the acceptor, either for granting time, or for releasing a portion of the debt while the days of grace are pending, or after they have expired (7), but

(1) Pothier, *d. l.* §§ 69-71.

(2) Reitz, *Aant. op Heineccius*, 2 *Hoofds.* § 14, *not.* 34 & 35.

(3) V. d. Keessel, *Thes.* 622.

(4) De Groot, *Intro.* 3 *B.* 13 *D.* § 8; Du Puy, *C.* 12; Pothier, 6 *Hoofds.* § 12.

\* The word in the text is "houder," or holder, which is obviously a misprint.—Tr.

(5) Pothier, 5 *Hoofds.* § 2.

(6) Pothier, *d. l.* § 6.

(7) *Cost. van Antw. C.* 55, *Art.* 10; Roseboom, *Recueil*, *C.* 50, *Art.* 7; De Groot, *Intro.* 3 *B.* 45 *D.* § 7; Reitz, *Aantleek. op Heineccius*, 3 *Hoofds.* § 17, *n.* 25.

he may receive part of the debt, and protest the bill for the remainder (1).

## SECTION XVII.

The protest is a formal act executed by a notary, in the presence of two witnesses, at the request of the holder of the bill, in order to prove the refusal of payment, or acceptance by the drawee (2). The certificate of protest contains:

Protests of  
bills of  
exchange.

1st. An application by the holder to the drawee even now to accept or pay the bill.

2nd. A statement of the answer, or of the silence of the person against whom the bill is protested, which is accepted as tantamount to a refusal.

3rd. A protest on the part of the holder of the bill, that, in consequence of this refusal, he will seek his remedy for his damages and interest, wherever it may lie, and that he will even take up the amount contained in the bill upon re-exchange (3). The protest must be made within the days of grace (4). In default thereof the holder loses his remedy against the drawer and indorsers (5). The protest must be made although the acceptor has hidden himself, or is notoriously bankrupt (6). The protest for non-acceptance or non-payment must be sent off by the first opportunity

(1) Phoonsen, *C.* 17, n. 19 & 20; Barels, *Adviesen over den Koophandel*, 2 D. adv. 35.

(2) Pothier, *d. l.* § 7.

(3) *Ibid.* *d. l.* § 8.

(4) V. d. Keessel, *Thes.* 627, 855, & 856.

(5) De Groot, *Intro.* 3 B. 45 D. § 5; Pothier, *d. l.* § 29, *Keur van Amsterdam van 29 Maart*, 1661, *Handv.* 2 D. p. 543, n. 5.

(6) De Groot, *d. l.* § 6; V. d. Keessel, *Thes.* 859.

to the indorser from whom the holder received the bill, or after the latter has informed the indorser thereof, directly to the drawer (1).

## SECTION XVIII.

Actions and  
procedure on  
a bill of  
exchange.

If a bill has been duly protested for non-payment, the drawer, all prior indorsers, and the acceptor become the debtors of the holder *in solidum*, and he may choose which of them he thinks it most advisable to sue (2). He has the power of recovering the debt due upon the bill by the *summary law of bills*, that is, by applying to the court for an order against the person, and an attachment of the goods of the debtor of the bill (3). It is necessary for this purpose, however, that there should not be the slightest doubt as to the justness of the claim, because otherwise the applicant is ordered to enter the case upon the Rolls, and to pursue his remedy there in the ordinary manner (4). Of course if the laws of the country or the local laws do not afford this extraordinary mode of proceeding, the action for payment upon a bill remaining unpaid must be proceeded with by the ordinary summons and declaration; saving the right to the plaintiff to pray for *provisional sentence*, by reason of the defendant's signature (5).

(1) De Groot, *Introd.* 3 B. 45 D. § 8; Phoonsen, *C.* 19, n. 3-5.

(2) Du Puy, *C.* 16, n. 1, & *suiv.*; Heineccius, 4 *Hoofds.* § 39.

(3) *Keur van Amst.* 20 Jan. 1679, *Ordonn. Rott.* 24 Aug. 1720, *Art.* 17, & *volg.*

(4) *Keur van Amst.* 30 Jan. 1777, in 't *tweede Vervolg der Handvestin*, p. 85, *Ordonn. op 't Procedeeren aldaar van 1779*, *C.* 9, *Art.* 45, & *volgg.*

(5) De Groot, *Introd.* 3 B. 13 D. § 6; Heineccius, 7 *Hoofds. en aldaar de Aanteek. van Reitz.*

# SECTION XIX.

A debt due upon a bill of exchange is extinguished : How a debt upon a bill is extinguished.

1st. By payment made *to* the owner of the bill or to the person authorised or empowered to receive payment on his behalf, whether by virtue of an indorsement, or whether by a separate deed of assignment, if the bill is not payable to order; and *by* the drawee or the person, who is pointed out by the bill as the person to make the payment; or by the surety to the bill; or, after the bill has been protested, by any person who takes the payment upon himself for the honour of the drawer or indorsers (1).

2nd. By release, given by the owner of the bill, *either* to the acceptor, whereby the drawer and indorsers are also released, unless the release was not voluntary, but forced: e.g. if he was forced, by the out-voting of the majority of the creditors of the acceptor, to adopt a compromise proposed by them; *or* to one of the indorsers, by which his personal obligation only, and not that of the prior indorsers, is extinguished (2).

3rd. By compensation or set-off of that which the holder clearly owes the acceptor on any other account (3). But a debt which the acceptor may demand from the payee or prior indorsers can never be set off against the holder of the bill (4).

4th. By novation.

5th. By merger (5).

(1) Pothier, 6 *Hoofds.* §§ 2-13.

(2) *Ibid.* *d. l.* §§ 14-22.

(3) Heineccius, 6 *Hoofds.* § 27, *not.* 39 & § 30, *not.* 44.

(4) Phoonsen, *C.* 16, § 17. See also Pothier, *d. l.* §§ 23-27.

V. d. Keessel, *Thes.* 623.

(5) Pothier, *d. l.* §§ 28-35.



6th. In some countries a short period of time is fixed for the prescription of a debt due on a bill; but by our law debts due on bills do not differ in this respect from other claims (1).

## SECTION XX.

Conclusion of  
this work.

With this I have now finished the task I set before myself. My object was to lay down the general fundamental principles of law and practice as clearly and fully as I could, to smooth the way to a deeper and more extensive inquiry for those who wish to acquire a general knowledge of law, which always remains uncertain, and can never be happily applied, if it does not rest upon solid grounds. If I have in any degree attained that object, my labour will always afford me satisfaction. I therefore submit it to judgment of the discreet reader, and conclude my work with the words of the immortal Huig de Groot (2)—

*“Quam ego in aliorum sententiis ac scriptis dijudicandis mihi sumsi libertatem, eandem sibi in me sumant omnes eos oro atque obtestor, quorum in manus ista venient. Non illi promptius me monebunt errantem, quam ego monentes sequar.”*

(1) Heineccius, 6 *Hoofds.* §§ 14–21; Pothier, *d. l.* §§ 36–45.

(2) Grotius, *de Jur. Bell. ac Pac. in Prolegom. n.* 16.

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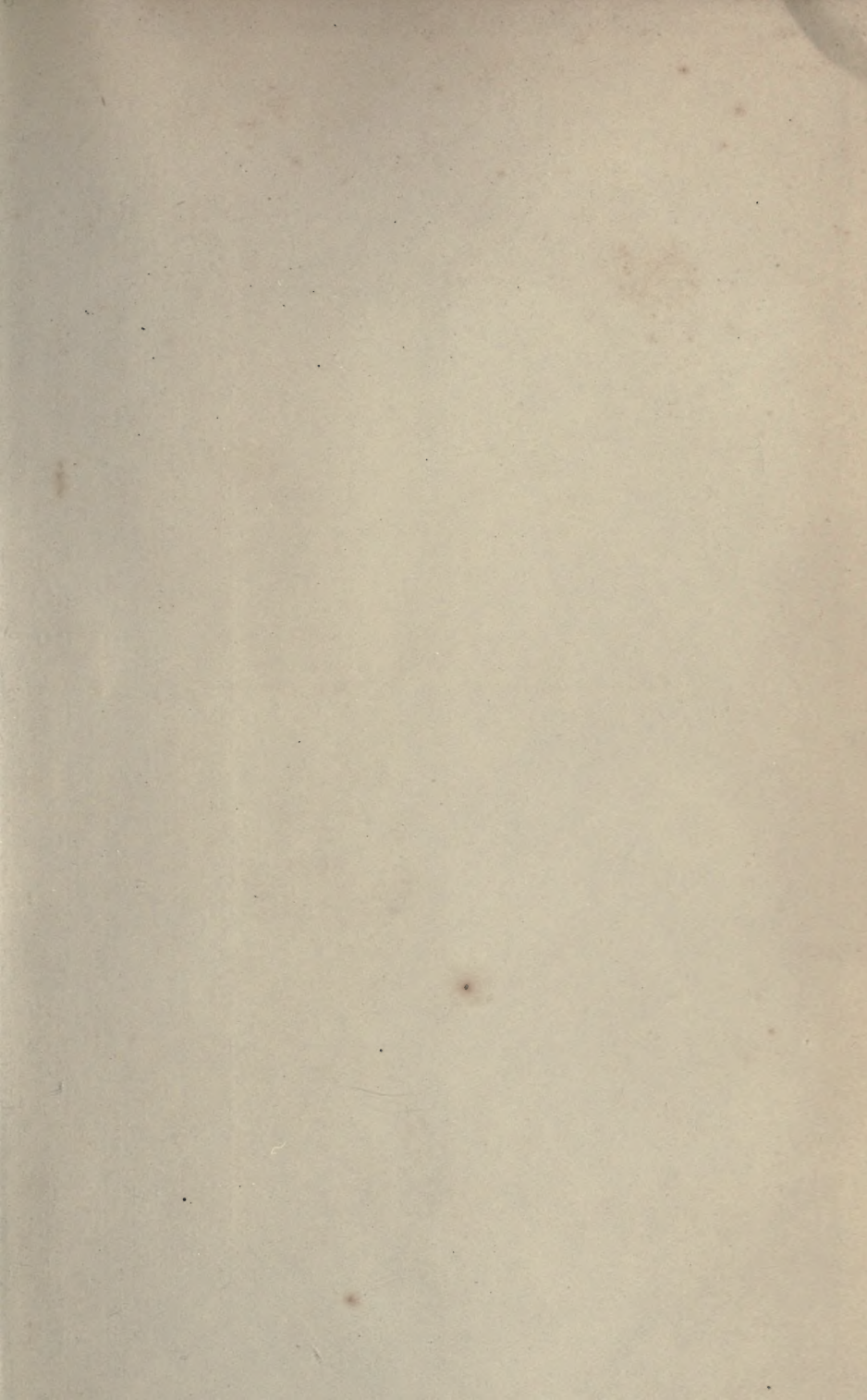
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